Success Village Apartments, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO. Cases 34–CA–9889–2, 34–CA–9908, 34–CA–9949, 34–CA–10007, 34–CA–10072, 34–CA–10172, 34–CA–10177, 34–CA–10205, 34–CA–10206, 34–CA–10222, 34–CA–10260, 34–CA–10296, 34–CA–10297, 34–CA–10357, 34–CA–10358, 34–CA–10543, 34–CA–10544, 34–CA–10545, 34–CA–10554, 34–CA–10555, 34–CA–10566, 34–CA–10697

August 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 30, 2004, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified below, and to adopt the Order as modified and set forth in full below.

I. THE JUDGE'S PROCEDURAL RULINGS

The Respondent has filed exceptions to several of the judge's procedural rulings. We find no merit in these exceptions.

First, the Respondent argues that the judge improperly granted a motion by the Connecticut State Attorney General to quash a subpoena requiring state mediator Thomas Sweeney to testify at the hearing on the Respondent's behalf. We find that the motion was properly granted, as Board policy does not permit a party to compel a mediator to testify in Board proceedings. See, e.g., *J. W. Rex Co.*, 308 NLRB 473 fn. 2 (1992), enfd. mem. 998 F.2d 1003 (3d Cir. 1993); *Tomlinson of High Point, Inc.*, 74 NLRB 681, 684–685 (1947).

Second, the Respondent argues that the judge improperly admitted into evidence the affidavit of the Respondent's former manager, George Heil, which was taken ex parte by the General Counsel after Heil ceased working for the Respondent. We reject this argument. Pursuant to Section 10058 of the Board's Casehandling Manual, Part I, the General Counsel's investigatory policy takes into consideration ethical standards applicable to Board attorneys, particularly the Model Code of Professional Responsibility 4.2 (MR 4.2), as well as the varying ethical codes of State jurisdictions. Connecticut Rule of Professional Responsibility 4.2, which is essentially the same as MR 4.2, permits ex parte contact between a government agency and former employees of a represented adverse party. *United States v. Housing Authority of Milford*, 179 F.R.D. 69, 71–72 (D.Conn. 1997), citing *Dubois v. Gradco*, 136 F.R.D. 341 (D.Conn. 1991). An exception exists for former employees who become trial consultants for their former employer by virtue of extensive involvement in gathering evidence and preparing for litigation, and as such are likely to be privy to privileged information. E.g., *MMR/Wallace Power and Industrial Inc. v. Thames Associates*, 764 F.Supp. 712 (D.Conn. 1991). The Respondent bears the burden of showing that Heil's affidavit should be excluded under this exception. *Housing Authority of the Town of Milford*, supra, 179 F.R.D. at 73–74. We find that the Respondent has failed to meet this burden.[3] There is no evidence of extensive dealings between the Respondent and its former manager Heil in preparation for this unfair labor practice litigation. Accordingly, we reject the Respondent's argument that Heil's affidavit was improperly obtained.

We also reject the Respondent's argument that it was prejudiced by the General Counsel's failure to provide the affidavit in advance of Heil's testimony. Pursuant to Section 102.118(b) (1) of the Board's Rules and Regulations, the Respondent was provided with the affidavit at the hearing prior to its cross-examination of Heil and it

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] There were no exceptions filed with respect to the allegations dismissed by the judge.

[3] Compare *MMR/Wallace*, supra, 764 F.Supp. at 723–725 (former employee functioned "almost exclusively" as trial consultant and paralegal with extensive contact with counsel, substantial disclosure of work product, and ongoing access to litigation materials and strategy), with *Housing Authority of the Town of Milford*, supra, 179 F.R.D. at 69 (former employee not deemed a "trial consultant" based on having had one meeting with former employer's attorney about which no specifics offered). Moreover, we note that the Respondent does not claim that Heil's affidavit actually contains any privileged information.

had an opportunity to cross-examine Heil about his prior statements.

Finally, the Respondent argues that the judge improperly allowed Union Representative Russell See to testify in rebuttal to Respondent witness Mark Zaken because See allegedly had the opportunity to hear about Zaken's testimony prior to testifying. However, the Respondent has presented no evidence to establish that See had prior knowledge of Zaken's testimony or that the judge's sequestration order had been violated. Therefore, we find that the judge properly allowed the testimony.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. Introduction

Respondent Success Village Apartments is a residential cooperative development comprising 97 buildings covering about 40 acres of land. The cooperative is run by a 9-member board of directors, which is composed of individuals who reside in the complex and who are elected by the other residents. The board employs a management company to oversee the daily operations of the complex. The Respondent's employees have been represented by the Union since about 1975.

In August 2001, the board of directors chose WC&F Real Estate and Development Corporation (WC&F) to manage the property because it believed that the company could effectively deal with various problems it had with the operation of the complex. In particular, the board expressed concerns that employees were inefficient and unproductive, and that the Union had opposed past attempts to make employees more efficient. The record shows that within a few months after WC&F took over management of the Respondent's property, the relationship between the Respondent and the Union became rancorous. It was in this context that the allegations of unfair labor practices that were litigated in this proceeding arose.

B. Alleged Disparagement of the Union

The judge found that the Respondent's board member, Robert Marcinczyk, violated Section 8(a) (1) of the Act by making disparaging remarks to Union Representative Russell See in the presence of unit employee Una Boulware. Marcinczyk had served as a shop steward for the Union pursuant to his employment at Milford Jai Alai, and had known See for several years relative to that employment prior to becoming a board member with the Respondent.[4] The credited testimony, set forth more fully in the judge's decision, establishes that on December 7, 2001, as See was leaving the Respondent's office, Marcinczyk yelled at See that he should tell the employees how he "fucked us over at Jai Alai," caused the place to close, and that he would "end up fucking this place up" as he had at Milford. The judge concluded that these statements, made in the presence of a unit employee, undermined the Union and were therefore coercive. We disagree.[5]

"It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Indeed, '[words] of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).'" *Trailmobile Trailers, LLC*, 343 NLRB No. 17, slip op. at 1 (2004), quoting from *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). Such statements by an employer constitute protected free speech under Section 8(c) of the Act unless conveyed in a coercive context.

Marcinczyk's remarks may have disparaged See and, by implication, the Union, but they did not suggest the futility of union representation or convey any express or implicit threats against union activity. On the contrary, Marcinczyk's statements reflected his personal dissatisfaction with See's past representation of employees in the Milford Jai Alai bargaining unit and his view that the Respondent's employees would fare no better with See's representation. In these noncoercive circumstances, the disparaging statements did not violate Section 8(a)(1) of the Act as alleged.

C. The December 2001 Layoff

The judge found that the Respondent's seasonal layoff of employee Dennis Brown on December 7, 2001, was unlawfully motivated by animus against his union activities. The Respondent argues that this finding should be reversed because the complaint allegation that Brown's layoff was unlawful was based upon a charge that was not timely filed within the meaning of Section 10(b) of the Act.[6] We find merit in the Respondent's argument.

On April 22, 2002, the Union filed a charge alleging

> since on or about April 2001, and continuing within the past six-months, the [Respondent] has been engaged [in] a course of action designed to undermine the Union . . .by eliminating bargaining unit jobs, changing the hours of employees, and otherwise changing the terms and conditions of employment of employees.

[4] Marcinczyk resigned his position as a shop steward at Milford Jai Alai in April 2001 when he was elected president of the Respondent's board.

[5] Member Liebman would affirm the violation found by the judge, for the reasons stated in his decision.

[6] Sec. 10(b) provides that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ."

The charge was amended in December 2002 to specifically allege that the Respondent tried to undermine the Union by, among other things, laying off Dennis Brown in December 2001.

We agree with the judge that the December 2002 amended charge was not timely filed within 6 months of Brown's layoff, and that the allegation that Brown's layoff was unlawful can withstand the Respondent's challenge under Section 10(b) only if it is closely related to the allegations in the charge that was filed in April. See *Redd-I, Inc.*, 290 NLRB 1115 (1988). Unlike the judge, however, we do not find that the amended charge allegation was closely related to the original allegations in the April charge.

In determining whether the layoff allegation in the amended charge was closely related to the allegations in the original charge, we consider the following factors: (1) whether the allegation involved the same legal theory as the allegations in the original charge; (2) whether the otherwise untimely allegation arose from the same factual circumstances or sequence of events as the allegations in the original charge; and (3) whether the Respondent would raise similar defenses to both allegations. See *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).

Although both allegations are based on a similar legal theory—that the Respondent violated Section 8(a)(3) by discriminating against employees and attempting to undermine the Union—the allegation about Brown's layoff did not arise from the same set of facts as the allegations contained in the original charge. Union Business Agent Michael Langston testified that he filed the original charge as a result of certain changes the Respondent made in the shifts of boiler room employees in March 2002. The employees affected by the shift change were John Netsel and Antonio Teja. Brown was not working at the time the shift changes were made, as he had been laid off from a nonboiler room position several months earlier.

Further, the Respondent would not likely have raised similar defenses to both allegations. Although preparation of a defense against any allegation of unlawful discrimination would commonly involve presenting evidence of reliance on a legitimate motive for acting, the Respondent would not be expected to preserve and prepare for use the same evidence of motivation for the seasonal layoff of Brown as it would for the shift changes of different employees in different jobs several months later. Indeed, as far as the Respondent knew prior to the filing of the untimely amended charge in December 2002, the Union was not claiming that Brown's layoff was discriminatory. To this point, the Respondent only had to defend against the Union's claim that the Respondent did not have the unilateral management right to make seasonal layoffs under the parties' contract.[7]

In these circumstances, we conclude that the allegation that Brown's layoff was unlawful was not closely related to the April charge. Accordingly, we dismiss the allegation as time-barred.

D. The Respondent's Refusal to Meet and Bargain Face-to-Face with the Union

The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing to engage in face-to-face bargaining with the Union and by insisting on conducting negotiations in separate rooms through a mediator. The judge also found that the Respondent violated the Act by declaring impasse and unilaterally implementing its bargaining proposals when the Union refused to bargain under these conditions. The Respondent has excepted to the judge's findings, arguing that the Union had no interest in legitimate bargaining and that any face-to-face meetings with the Union would not have been productive. For reasons discussed below, we reject the Respondent's arguments and affirm the judge's findings.

The most recent collective-bargaining agreement between the parties expired on May 31, 2002.[8] The parties began negotiations for a new agreement on May 15, and subsequently met on May 23, July 15, and July 22. However, little progress was made during those sessions. After the July 22 session, the Respondent requested the aid of State Mediator Thomas Sweeney to help facilitate negotiations, and the Union consented to Sweeney's participation.

The parties met with Sweeney at the Connecticut Board of Arbitration on August 29. The Respondent's representatives arrived first for the meeting and met separately with Sweeney for about an hour. When the Union's representatives arrived, Sweeney asked them to wait in another room. Sweeney then met with the Union's representatives and informed them that the Respondent refused to meet in face-to-face bargaining sessions and insisted on conducting bargaining with Sweeney acting as the intermediary. The Union protested, asserting that the parties were far apart in their positions and needed to deal with each other directly across the table. The parties did not directly engage in

[7] On December 5, 2001, shortly after Brown was informed of his impending layoff, the Union filed a charge alleging that the Respondent violated Sec. 8(a)(5) by "laying off employees [and] by calling them seasonal workers, when the contract has no provision for seasonal workers." This charge was dismissed, and the Union's appeal of the dismissal was denied. Subsequently, an arbitration panel found merit in the Union's contractual claim and ordered Brown reinstated.

[8] All dates are in 2002 unless otherwise indicated.

any contract discussions, and the session ended with no agreement as to how future bargaining sessions would be conducted.

Immediately after meeting with Sweeney, the Union sent a letter to the Respondent demanding that the parties resume face-to-face negotiations. The Union asserted that the parties were still in the early stages of negotiations and were not "close to the point of needing a go-between to arrange trade offs." The Respondent replied that it was willing to meet in separate rooms with a mediator acting as an intermediary. The parties did not engage in any bargaining sessions after August 29.

The Respondent reiterated its bargaining conditions in a September 29 letter to the Union. In early October, based on the Union's refusal to negotiate under the Respondent's conditions, the Respondent declared that the parties were at impasse and unilaterally implemented its proposals for a new contract.

We agree with the judge that the Respondent violated Section 8(a) (5) of the Act by refusing to bargain with the Union unless the sessions were conducted through a mediator, with the parties remaining separated. Section 8(d) of the Act requires that employers and unions "meet at reasonable times and confer in good faith" about terms and conditions of employment. Here, we find that the Respondent did not satisfy this requirement.

Mediation is a well-established means of facilitating the process of collective bargaining. Where parties have agreed to mediation, it is common practice for a mediator to conduct separate meetings in attempting to explore avenues for compromise and ultimate agreement. This practice is not in conflict with the Act's requirement to meet and bargain in good faith.[9] Indeed, it seems particularly well-suited for parties, such as the Respondent and Union, who shared responsibility for a series of heated and unproductive face-to-face meetings.

However, face-to-face meetings are the bargaining norm and are routine even in mediated negotiations. In this case, the Respondent unilaterally imposed the precondition that the parties could not meet face-to-face. Although parties may voluntarily agree to engage in mediation as a means of collective bargaining, the use of mediation as a bargaining process is a permissive subject of bargaining, and a party may not insist on mediation, much less on a particular mediation format, to the point of impasse. See *Riverside Cement Co.*, 305 NLRB 815, 818–819 (1991), affd. mem. 976 F.2d 731 (5th Cir. 1992).[10] That is what the Respondent did here after the Union clearly expressed its position that direct, face-to-face negotiations were necessary. Under the law set out above, it was the Union's prerogative to decline the Respondent's offer to bargain in separate rooms through a mediator. Under the same law, the Respondent's insistence to impasse on this nonmandatory subject of bargaining procedure is a violation of Section 8(a) (5).

The Respondent relies on the behavior of the Union's representatives in antecedent negotiations and grievance proceedings to justify its insistence on this precondition to further bargaining. The conduct of the Union's negotiators may have been confrontational and derisive of management officials (and those officials at times responded in like manner), but the Respondent has failed to show that this conduct rose to the level of bad-faith bargaining that would excuse the Respondent from bargaining altogether, e.g., *Times Publishing Co.*, 72 NLRB 676, 683 (1947) ("a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found."), or permit it to impose conditions on negotiations, e.g., *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976) (an employer is justified in refusing to meet with a particular union representative if there is "persuasive evidence that the presence of [that individual] would create ill-will and make good faith bargaining impossible.") We therefore agree with the judge that the Respondent's refusal to meet and bargain with the Union face-to-face violated Section 8(a) (5) of the Act, as did its subsequent unilateral implementation of new terms and conditions of employment in the absence of a legitimate impasse in bargaining.

E. Raul DeSousa's Disciplinary Warning

The judge found that the Respondent violated Section 8(a) (3) of the Act when it issued a written warning to leadman Raul DeSousa on July 5 for allegedly failing to assign work to union activists Dennis Brown and Antonio Teja and allowing them to stand around the shop area.[11] At around 11:30 a.m. that morning, Property Manager Francis Callahan entered the shop area and observed that Brown and Teja were not working. In re-

[9] We disagree with the judge to the extent he suggests that bargaining through a mediator would inhibit the parties from reaching agreement.

[10] We find no merit in the Respondent's argument that *Riverside Cement* is distinguishable from the situation here because Sweeney was willing to mediate the negotiations. The Board's decision in *Riverside Cement* did not turn on the willingness of the mediator to participate in negotiations. Rather, the Board found that "in general, an employer's obligation under Section 8(d) of the Act to meet at reasonable times with the employee representative is wholly independent of the willingness of any mediator to participate." 305 NLRB at 818.

[11] The Respondent does not contend that DeSousa was a statutory supervisor.

sponse to questioning by Callahan, Brown stated that he was working on in-walks (paved pathways on the Respondent's premises), but that no one had told him which in-walks to do. Callahan subsequently disciplined DeSousa for failing to make work assignments, but decided not to discipline either Brown or Teja for being idle because they had not been given assignments. There is no evidence that DeSousa was a union activist, or that the Respondent suspected that he was a union activist.

The warning issued to DeSousa stated that he had failed to assign work to the employees from 10:15 to 11:50 a.m. The judge, however, credited Brown's testimony that both employees had been at the garbage dump during most of that time, and had returned to the Respondent's property at approximately 11:20 a.m. Based on this finding, the judge concluded that the reason given for DeSousa's discipline was false, and inferred that the discipline was motivated by the Respondent's animus toward the union activities of Brown and Teja. Accordingly, the judge found the discipline unlawful. We disagree.

Under *Wright Line*,[12] the General Counsel bears the burden of establishing that the Respondent's discipline of DeSousa was unlawfully motivated. We find that this burden has not been met. The General Counsel does not argue that the warning was used to retaliate against DeSousa for his own union activities, but rather argues that the discipline was intended to discourage or retaliate against support for the Union by Brown and Teja. However, the General Counsel has provided no basis for finding that imposing discipline on DeSousa was intended to serve any purpose other than assuring that an employee subject to this leadman's directions was assigned sufficient work. Indeed, the evidence shows that Callahan specifically declined to discipline known union activists Brown and Teja for their idleness,[13] and there is no evidence that the Respondent, by means of this warning, was attempting to impose harsher terms of employment on Brown or Teja. There is also no evidence that the Respondent tolerated the failure of DeSousa or other leadmen to assign sufficient work to employees who were not known union activists. Consequently, we reverse the judge and dismiss the allegation of a discriminatory warning for DeSousa.

F. Dennis Brown's Disciplinary Warning

We agree with the judge that a written disciplinary warning issued to Dennis Brown as a result of a confrontation he had with supervisor George Heil was unlawful under Section 8(a)(3) of the Act. On the afternoon of July 5, Raul DeSousa approached Brown, who was the Union shop chairperson, about the warning DeSousa received for his alleged failure to assign work to Brown and Teja. Brown and DeSousa then went together to Heil's office to discuss the warning, which they believed was unwarranted. At the outset of the discussion, Brown, who was admittedly upset, loudly asked, "What the hell is this crap?" Brown then apologized and quieted down, but demanded the identity of the employees involved. A week later, on July 12, the Respondent issued a written warning to Brown stating that his behavior had been disruptive and unprofessional, and that such behavior would not be tolerated.

It is clear that Brown was acting in his capacity as shop chairperson when he confronted Heil, and that he was engaged in protected conduct at the time. Thus, the appropriate inquiry here is whether the nature of Brown's conduct was so egregious as to remove him from the protection of the Act. To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and 4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

Applying these factors here, we find that Brown's behavior was not so extreme as to cause him to lose the protection of the Act. The discussion with Heil concerned the discipline of a unit member and took place in Heil's office where only Heil, Brown, and DeSousa were present. Although Brown admittedly used crude language and yelled at Heil at the outset of the discussion regarding the merits of the discipline, he subsequently apologized for his behavior and resumed normal discourse. There is no evidence that Brown's outburst, which apparently lasted only a few seconds, was disruptive to the workplace. Finally, although Brown's outburst was not provoked by any of the Respondent's unfair labor practices, it was not uncharacteristic of the occasionally intemperate conduct engaged in by both management and union representatives during grievance and contract discussions. In these circumstances, we do not find that Brown's conduct lost the Act's protection. We therefore affirm the judge and find that the discipline was unlawful.

G. Subcontracting of Unit Work

The judge found, and we agree, that the Respondent violated the Act by subcontracting plumbing work on

[12] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[13] This failure to discipline therefore stands in contrast to the unlawful warning issued 2 days earlier to Brown for "malingering" while he was engaged in protected grievance activities.

July 5, 2002, and also by subcontracting various types of boiler room work in the fall of 2002.[14] The relevant provision of the parties' collective-bargaining agreement, which we find to have been in effect at the time that the work was subcontracted,[15] stipulated that unit work would not be performed by nonunit members except in limited circumstances, such as in emergencies when employees are not available.[16] Additionally, the parties have an established practice under which the Respondent advises the Union when it is considering the subcontracting of unit work, and unit employees are then given the opportunity to perform the work or to decline it. Pursuant to this practice, the job is subcontracted only if there is no unit employee who is able and willing to perform the work.

On July 5, employee Lloyd Reid was assigned to snake a bathroom sink. Reid took the sink trap apart and snaked the sink, but was unable to reassemble the trap. Reid then told Supervisor Heil that he was not able to complete the repair, and Heil called a subcontractor. Heil did not consult with a union representative about the work.[17] Because Heil did not follow the Respondent's practice with regard to subcontracting, we agree with the judge that the Respondent violated the Act by not contacting the Union and giving unit members the opportunity to perform the work.

For similar reasons, we affirm the judge's finding that the Respondent unlawfully subcontracted boiler room work in the fall of 2002 that included starting and checking the boiler, repairing an oil lead, and cleaning and servicing the burners and boilers. The Respondent argues that the work was properly contracted out because employee John Netsel, who was the only employee assigned to the boiler room, was out of work with an injury at the time. We do not find this argument persuasive. The fact that Netsel was not available to perform the work does not justify the Respondent's undisputed failure to consult with the Union prior to the subcontracting of the work pursuant to the established practice.[18] Accordingly, we affirm the judge's finding of the violation.[19]

H. Reduction of Sick Leave Accrual

The judge found that the Respondent violated both Section 8(a)(5) and (3) of the Act by unilaterally reducing Brown's annual sick leave accrual in August 2002 as a result of his layoff from December 7, 2001, to May 1, 2002. We agree with the judge, for reasons set forth in his decision, that the reduction of sick leave accrual violated Section 8(a)(5).[20] However, we reverse the judge's finding that the change also violated Section 8(a)(3) and (1), as this finding was contingent on a finding that Brown's December 2001 layoff was unlawfully motivated by animus against his protected union activities. Because we have dismissed the allegation regarding the layoff, as discussed above, we also dismiss the allegation that the change in sick leave violated Section 8(a)(3) and (1).[21]

I. The October 2002 Layoff

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by laying off Dennis Brown in October 2002.[22] Based on the credited testimony of Re-

[14] We reverse the judge's finding that the Respondent unlawfully assigned the task of changing a single light bulb to an electrical subcontractor who was performing nonunit work on the Respondent's property, as we find that the amount of work involved was too insignificant to warrant finding a violation.

[15] As stated above, the agreement expired in May 2002, and the parties had not reached a new agreement or lawfully bargained to impasse by the close of the hearing in this proceeding.

[16] The agreement provided, in relevant part, that:

> Persons excluded from the bargaining unit shall not perform work of the type customarily performed by employees of the bargaining unit, except in the following situations: a) in emergencies when employees are not available, b) in the bona fide instruction or training of employees, c) duties of an experimental nature or in the case of vendors or warrantees [sic], tryouts.

[17] The record indicates that Reid served as steward or shop chairperson at some later point; however, there is no evidence that Reid was acting as steward at the time of this incident. Further, the Respondent does not argue that its obligation to consult with the Union was satisfied because of Reid's position as steward.

[18] The Respondent does not contend that the work was subcontracted out pursuant to the collective-bargaining agreement's emergency clause.

[19] In finding the violation, we do not rely on the judge's finding that the work could have been performed by Dennis Brown. Regardless of whether Brown was qualified to do the work, a violation is established by the Respondent's failure to follow its established practice of notifying the Union and giving the employees an opportunity to perform the work.

[20] We reject the Respondent's argument that the judge improperly allowed the General Counsel to amend the complaint at the hearing to allege that the change in sick leave accrual violated Sec. 8(a)(5) and (1). The relevant charge, which was filed within the 10(b) period and attached to the complaint, alleged that the Respondent had "failed and refused to bargain in good faith by unilaterally reducing sick leave accrual for employee Dennis Brown." Thus, we find that the Respondent was on notice of the allegation, and that the amendment was properly allowed by the judge.

[21] Member Liebman would find it unnecessary to pass on whether the reduction of sick leave accrual violated Sec. 8(a)(3) and (1), as the remedy for such a violation would be cumulative. See *Tri-Tech Services*, 340 NLRB 894, 895–896 (2003) (and cases cited therein).

[22] We also affirm the judge's findings, for reasons set forth in his decision, that the Respondent acted unlawfully by disciplining Brown assertedly for taking too much time to write grievances, by refusing to provide Brown with asbestos training, and by imposing more onerous working conditions on Brown beginning in May 2002. The judge found, and we agree, that each of these actions was motivated by Brown's activities as shop chair. We find it unnecessary to pass on the judge's finding that the Respondent harassed Brown by assigning him

spondent's board member, Judith Cannizzio, that the board targeted Brown for layoff in the fall of 2002 because of his union activities, we find that the General Counsel has met his burden under *Wright Line* of establishing that the layoff was unlawfully motivated.[23] We further find that the Respondent has failed to establish that Brown was laid off due to a lack of work, as it argues in its brief. Indeed, the evidence shows that at the time of the layoff, Brown was installing sheetrock and painting ceilings, and that the project had not been completed when Brown was told he would be laid off for lack of work. Accordingly, we affirm the judge's finding of the violation.

J. The Weingarten Allegation

The judge found that employee John Netsel was unlawfully denied his *Weingarten* right[24] to have a union representative present during a meeting with Supervisor Phil Segneri on the afternoon of July 8, 2003. For reasons discussed below, we reverse the judge's finding that this conduct violated Section 8(a)(1)of the Act.

Netsel works in the Respondent's boiler room. Some time in late June 2003, Segneri instructed Netsel that he should keep the boiler room doors closed any time he was not in the room. On the morning of July 8, 2003, Segneri called Netsel into his office and asked him why he had not locked the doors when he was out of the room. Netsel replied that he had been told only to close the doors, not lock them. There was no discussion or portent of possible disciplinary action during this meeting. Later that day, Segneri again called Netsel to his office. According to Netsel's credited testimony, Segneri appeared "annoyed" and "agitated" from the morning meeting and Netsel believed the second meeting would be a continuation of the earlier session and that he would be disciplined. Netsel indicated at that time that he wanted to have a union representative present, but Segneri would not allow it. Segneri then told Netsel that he wanted to make it clear that Netsel was not to leave the boiler room doors unlocked when he was out of the room, and asked Netsel to sign a statement acknowledging that instruction.

Contrary to the judge, we find that the Respondent was not required to comply with Netsel's request for a union representative during the afternoon meeting.[25] Under *Weingarten*, an employee has a right to request that a union representative be present during an investigatory interview if the employee reasonably believes the meeting will result in discipline. An employer who ignores the employee's request and then proceeds with the interview violates Section 8(a) (1) of the Act.

Even assuming, arguendo, that Netsel reasonably believed, based primarily on his observation of Segneri's demeanor, that discipline could result from the afternoon meeting, he was not entitled to union representation.[26] The *Weingarten* right does not apply to an interview held solely for the purpose of informing an employee of a previously made disciplinary decision. See *Baton Rouge Water Works*, 246 NLRB 995 (1979). A fortiori, no *Weingarten* right attaches to an interview whose sole purpose is to inform the employee of a previously made *nondisciplinary* administrative decision. The afternoon meeting between Netsel and Segneri was limited to this purpose. It had no investigatory aspect.[27] Segneri did not question Netsel during the meeting or seek to obtain any information from him. He reconfirmed instructions to Netsel about locking the boiler room doors and secured Netsel's written acknowledgement of these instructions. Thus, we find that the Respondent had no obligation to allow a union representative to be present at the meeting, and did not violate the Act by refusing Netsel's request.

K. The Locker Policy

The judge found that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing a locker

more arduous work, as this finding is cumulative and does not substantially affect the remedy.

Finally, for the reasons set forth in the judge's decision, we affirm his finding that the Respondent violated Sec. 8(a)(3) on July 24, 2003, by sending shop steward Reid home without pay for a half day.

[23] In affirming the judge's findings that the General Counsel proved Respondent's animus against union activities, Member Schaumber does not rely on former manager Heil's statement of "belief" that Property Manager Callahan "had it in" for the Union, Brown, and bargaining unit employees.

[24] See *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975).

[25] Member Liebman would affirm the violation found by the judge, for the reasons stated in his decision.

[26] Member Schaumber additionally finds, under the circumstances of this case, that Netsel lacked a reasonable belief that discipline would result from the afternoon meeting. Netsel had already met with Segneri that morning in an investigatory interview about locking the boiler room doors and had fully explained his actions. There is no evidence that Segneri suggested the possibility of disciplinary action for the conduct under investigation.

Chairman Battista does not pass on this rationale for the dismissal. He agrees with the rationale set forth in the text that the meeting was solely to inform Netsel, and obtain his acknowledgment, that the boiler room was to be locked.

[27] Contrary to the judge's analysis, it does not matter whether Netsel reasonably believed the afternoon meeting would entail further investigation. The question is whether the interview *in fact* has investigatory aspects leading to or supporting disciplinary action. See *U.S. Postal Service*, 252 NLRB 61 (1980) (employees not entitled to a *Weingarten* representative during "fitness for duty" medical examinations, in part because of "the absence of evidence that questions of an investigatory nature were in fact asked at these examinations.")

policy on July 3, 2003.[28] The Respondent argues that it was not required to bargain with the Union over the policy's implementation because the policy did not constitute a material change in terms and conditions of employment. As discussed below, we find merit in the Respondent's argument.

Pursuant to the terms established by the parties' most recent collective-bargaining agreement, the Respondent provides employees with various types of equipment, and each employee is personally responsible for the loss or negligent destruction of that equipment. The Respondent also provides employees with access to lockers in the shop area to store their equipment. Prior to the issuance of the locker policy, employees could choose a locker and secure it with a lock that they provided. Under the new policy, each employee was assigned a locker and issued a combination lock by the Respondent.

Although employees were previously allowed to choose their lockers, there is no evidence that there is any significant difference among the lockers or that there was competition among employees regarding access to a particular locker. Cf. *J. R. Simplot Co.*, 238 NLRB 374, 375 (1978) (unilateral assignment of lockers by employer unlawful where use of lockers by employees had been a "festering problem" within the plant). The policy did not provide any discipline for the failure to utilize the assigned locker or the lock, and there is no evidence that such discipline was imposed or that there was more rigorous enforcement of the contract's provision regarding loss of equipment as a result of the new policy. Further, employees were able to secure their lockers before and after the issuance of the policy; the only difference was that under the new policy the Respondent provided the locks. In these circumstances, we find that the new locker policy did not represent a material change in employees' terms and conditions of employment that required bargaining. Accordingly, we reverse the judge and dismiss the relevant 8(a)(5) allegation.

[28] The judge also found that the Respondent violated Sec. 8(a) (5) by unilaterally implementing changes in its timecard discrepancy disciplinary policy, phone policy, fax policy, and copier policy. We affirm the judge's findings for the reasons set forth in his decision. With respect to the copier and fax machine, the Union was permitted to use it in the past, without charge. In the instant case, the Respondent announced a new policy, under which there would be a charge of 25 cents per page for copying, and there would be no fax use at all. There is no showing that the Union's use of either machine exceeded that which it had been in the past. The Respondent would not be required to permit any increase in usage.

With regard to the change in the timecard policy, Chairman Battista and Member Schaumber find it unnecessary to pass on Board precedent, cited by the judge, indicating that a contractual management rights clause does not survive expiration of the contract.

ORDER

The Respondent, Success Village Apartments, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to negotiate with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO, in face-to-face bargaining sessions concerning the terms of a renewal collective-bargaining agreement.

(b) Insisting, as a condition of reaching any collective-bargaining agreement, that the Union agree to conduct negotiations in separate rooms through an intermediary.

(c) Bargaining to impasse in support of the condition set forth above in paragraph (b), and implementing its contract proposals as a result of the unlawful impasse.

(d) Unilaterally implementing a restricted phone use policy, a copier and facsimile use policy, and a timecard discrepancy disciplinary policy without bargaining with the Union or obtaining the Union's consent.

(e) Unilaterally reducing employees' sick leave accrual without bargaining with the Union or obtaining the Union's consent.

(f) Laying off, suspending, issuing warnings, or otherwise discriminating against employees because of their union activities.

(g) Unilaterally subcontracting unit work without bargaining with the Union or obtaining the Union's consent.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union, in face-to-face sessions, as the exclusive representative of the employees in the following appropriate unit, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> All production, maintenance, and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by Respondent, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

(b) Rescind, at the Union's request, the unilateral changes it made in terms and conditions of employment, including the restricted phone use policy, copier and fac-

simile use policy, the time card discrepancy discipline policy, and the reduction of sick leave accrual.

(c) Rescind, at the Union's request, the proposals that it implemented following its announcement of an impasse in bargaining.

(d) Make Dennis Brown and Lloyd Reid whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, suspension, and written warnings, and within 3 days thereafter notify the employees in writing that this has been done and these unlawful actions will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Bridgeport, Connecticut, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all placed where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2001.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 28, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to negotiate with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO, in face-to-face bargaining sessions concerning the terms of a renewal collective-bargaining agreement.

WE WILL NOT insist, as a condition of reaching any collective-bargaining agreement, that the Union agree to conduct negotiations in separate rooms through an intermediary.

WE WILL NOT bargain to impasse in support of the condition set forth above, and implement our contract proposals as a result of unlawful impasse.

WE WILL NOT unilaterally implement a restricted phone use policy, a copier and facsimile use policy, and a timecard discrepancy discipline policy without bargaining with the Union or obtaining the Union's consent.

WE WILL NOT unilaterally reduce employees' sick leave accrual without bargaining with the Union or obtaining the Union's consent.

WE WILL NOT unilaterally subcontract unit work without bargaining with the Union or obtaining the Union's consent.

WE WILL NOT discipline, lay off, suspend, or otherwise discriminate against employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, on request, bargain with the Union in face-to-face sessions, as the exclusive representative of the employees, in the following appropriate union, concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All production, maintenance, and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by us but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

WE WILL rescind, at the Union's request, the unilateral changes in terms and conditions of employment that we have made.

WE WILL rescind, at the Union's request, the proposals that we implemented following our announcement of an impasse in bargaining.

WE WILL make Dennis Brown and Lloyd Reid whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful layoffs, suspension, and written warnings of Dennis Brown and Lloyd Reid, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs, suspensions, and written warnings will not be used against them in any way.

SUCCESS VILLAGE APARTMENTS, INC.

Thomas E. Quigley and *Jennifer F. Dease, Esqs.*, for the General Counsel.

Marc L. Zaken and *John D. Doran, Esqs. (Edwards & Angell, LLP)*, of Stamford, Connecticut, for the Respondent.

Thomas Meiklejohn, Esq., Livingston, Adler, Pulda, Meiklejohn & Kelly, Esqs., of Hartford, Connecticut, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Various charges and amended charges were filed by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO (Union) which resulted in complaints being issued on February 28, 2003, April 30, 2003, June 10, 2003, and September 4 and 24, 2003, against Success Village Apartments, Inc. (Respondent). All of the complaints were consolidated for hearing, and some were amended during the hearing.

The Union has been the representative of the production, maintenance and clerical employees of the Respondent since about 1975. They have had a collective-bargaining relationship since that time, with the most recent contract running from June 1, 1999 through May 31, 2002.

The complaints allege essentially that the Respondent unlawfully (a) denied Union representatives access to work areas (b) disparaged Union representatives in the presence of unit employees (c) laid off employee Dennis Brown on December 7, 2001 (d) prohibited employees from talking to Union representatives (e) imposed more onerous working conditions on Brown (f) issued written discipline in the Summer of 2002 to Brown, Raul DeSousa and Antonio Teja (g) reduced Brown's sick leave accrual, refused to provide asbestos awareness training to Brown and Teja, and thereafter laid off Brown on October 11, 2002 (h) unilaterally implemented a restricted phone use policy, a copier and facsimile use policy, a time card discrepancy discipline policy, and a locker and lock policy (i) unilaterally reduced the paid time for Union officials engaged in representation functions (j) unilaterally subcontracted certain work that had previously been performed by unit employees (k) during bargaining, insisted, as a condition of reaching a contract, that the Union agree to conduct negotiations in separate rooms through an intermediary, and bargained to impasse on that condition, and thereafter implemented its contract proposals (l) denied the request of employee John Netsel to be represented by the Union during a disciplinary interview (m) harassed employee Brown, in violation of Section 8(a)(3) and 8(a)(4) of the Act, and employee Lloyd Reid in violation of Section 8(a)(3), by assigning them work they do not normally perform, assigning them work without the use of customary or adequate equipment, assigning them work without customary or adequate assistance, watching them more closely and more frequently while they work, and assigning them more physically demanding work and (n) suspended Reid on July 24, 2003, and suspended Brown on October 20 and 21, 2003.

The Respondent's answers denied the material allegations of the complaints, and alleged certain affirmative defenses. On June 11–13, September 15–18, 22–24, and December 15–17, 2003, a hearing was held before me in Hartford, Connecticut.

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Bridgeport, Connecticut, has been engaged in the

[1] The General Counsel's unopposed motion to correct the transcript is hereby granted, and is received in evidence as GC 95.

operation of a non-profit cooperative apartment complex. During the 12-month period ending January 31, 2003, the Respondent derived gross revenues in excess of $500,000, and during the same period it purchased and received at its facility goods valued in excess of $50,000 directly from points outside Connecticut. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Success Village Apartments is a residential cooperative development built in 1941, consisting of 924 apartments in 97 buildings spread over about 30 to 40 acres. The complex has a central heating plant located in the main building which also houses, on the main floor, a community hall which is a large meeting room, a management office, and a business office where the clerical employees work. Below the main floor is the maintenance area which contains a carpenters' shop which is adjacent to the boiler room.

A nine-member board of directors, all of whom are residents of the development and elected by the residents, runs the Respondent. The board has monthly meetings.

Since about 1975, the Union has represented the Respondent's employees in the following appropriate collective-bargaining unit:

> All production, maintenance and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by Respondent, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

The last collective-bargaining agreement between the parties ran from June 1, 1999 through May 31, 2002. The contract contains a list of wages for various "labor grades", specifically mentioning leadman, bookkeeper A, plumber 1A, fireman 1A 1st shift, carpenter, bookkeeper 1B, fireman B, mason, groundsman, plumber 1B, bookkeeper assistant, and carpenter's helper 1B. In 1999, about 20 employees worked for the Respondent. In the Fall of 2001, there were 13 to 17 workers. The Union has two on-site agents who are the Respondent's employees. They are the shop chair and the shop steward.

The property has been managed over the years by several management companies. As will be set forth below, in the summer of 2001, the board of directors decided to obtain a new management company to remedy certain problems it had with the operation of the complex. Chief among its concerns was its belief that the employees were not working hard and were inefficient, and attempts to correct that situation in the past were met with vigorous Union opposition, including the filing of grievances.

B. The Meetings Between the Parties and their Bargaining

1. The Meeting of June 6, 2001

Newly elected board president Robert Marcinczyk suggested that the board of directors and the Union meet in an informal session to attempt to work out their differences. Marcinczyk had been a shop steward for the Union at the Milford Jai Alai, and believed that his acquaintance with Union president Russ See could be used productively at Success Village.

Board member June Prescott testified that when See walked into the meeting he objected loudly to her having a tape recorder present. She heard See remark that the Union would cause the Respondent to become bankrupt due to legal expenses caused by the grievances it intended to file. Marcinczyk testified that employee Michael Langston, who later became the Union's business agent, told him, in connection with a grievance in June, 2001, that the Union would run up the Respondent's legal bills.

See stated that the board wanted to make changes in the current contract, such as a reduction in the work force; the termination of employee Pierre Agnant; a proposal that board members perform work done by the clerical unit employees; and a change in the contractual provision for time and one-half for Saturday work. See refused to agree to those changes and walked out of the meeting.

2. A New Property Manager is Hired

On August 8, 2001, the Respondent's board of directors hired WC&F Real Estate and Development Corporation to be its property manager. Frank Callahan is the president. His on-site managers at the location, successively, were Jim Elliott, George Heil, and Philip Segneri. For about six months prior to the hire of WC&F, the Respondent's board managed the property. Prior to that time, the Respondent had various property managers.

Board member Prescott testified that in the summer of 2001, she heard complaints from residents that certain maintenance employees were not working hard and not doing their jobs. She said that these complaints were not remedied because there was a "strict union" and nothing could be done about it. Whenever the prior management attempted to remedy the situation by making the workers more efficient, a grievance would be filed which was too expensive to litigate, so the board settled the grievance and "rolled over." Board member Barbara Ignatiuk testified that the board was upset at the lack of productivity of the employees, and that Callahan was hired to make the operation more efficient. She noted that the board did not tell him to harass the workers, nor to give Brown harder assignments. Board member Marcinczyk testified that one of the reasons the board changed property managers was that it wanted to take a more active part in union related matters.

WC&F president Callahan testified that the board felt "very frustrated" with its relationship with Union president See and with the Union. Callahan was informed that the board tried to work together with the Union but each time they had a transaction he just walked out on their meetings. Callahan was also told that the employees were inefficient and wasted time, costing the Respondent money, and although the board told the

prior property managers to make the operation more efficient, they were not able to. He was told that the board's efforts to promote greater productivity were resisted by the Union, which filed grievances and had numerous meetings which resulted in increased legal fees for the Respondent.

Callahan was asked to recommend a course of action to help the board with its "union situation" and "solve their problems." Callahan assured the board that he anticipated that with the Union's cooperation, he would have the operation running smoothly. He offered to evaluate and observe all of the Respondent's operations, including how the employees perform their jobs, and the length of time they take to perform their tasks as compared to a "normal" worker, and then make recommendations. Callahan testified that prior to implementing any changes, he analyzed each employee's position and function in an effort to determine how productive the employees were, in order to see what changes could be made to make the operation more efficient. He reviewed the number and type of work orders, he personally observed the employees at work, and determined their skill levels. Callahan suggested an "amendment" to each work category describing each employee's responsibilities.

Callahan's observations and conclusions included the following: He observed that the two workers on garbage detail drove slowly and that there was no accountability as to when they left the premises to take the garbage to the dump or when they returned. He concluded that only one employee was required for that task. Nevertheless, he did not reduce the detail to one employee. He also observed that leadman Joseph Otocka only distributed assignments, but not much more. Callahan conceded that the leadman's job is to distribute work orders and do no other work, but that as part of the changes he hoped to implement, he wanted the leadman to perform other work. Plumber Ralph Giannattassio was very inefficient, and as a result his work hours were reduced by one-half; clerical employee Ceil Johnson, who had limited computer and typing skills, had an office which was untidy. Clerical employee Una Boulware did not make good use of her time. Clerical employee Agnant did special, long term "make-work" projects and filled in when employees were at lunch, and "he did nothing." As a result, his job was eliminated and Agnant was discharged. John Kelly who was on light duty due to an injury, answered the phone in the office.[2] Callahan stated that before making those decisions, the Respondent did not offer to bargain with the Union because it was exercising its management rights.

Callahan also recommended to the board that based on its history with the Union, and if it wanted to make changes, that it retain a labor attorney. There was also some confusion on the part of the board members as to whether the contract would terminate on its expiration date. Thereafter, Callahan recommended attorney Marc Zaken, and the Respondent interviewed and hired him.

[2] Arbitration decisions upheld the Respondent's reduction of Giannattassio's hours, and the elimination of the positions of Agnant and Kelly.

3. The Grievance Meetings Between the Parties[3]

a. The Meeting of October 19, 2001

Manager Callahan testified that in October, 2001, the Respondent terminated Agnant, discharged Teja and cut plumber Giannattassio's weekly work hours from 40 to 20, in an effort to assert its management's rights pursuant to the contract. The Union filed grievances regarding these actions, and Callahan asserted that the situation was "totally out of control," with the Union doing whatever it wanted when it wanted to do it.

On October 19, a meeting was scheduled for 10:00 a.m. between the Union and the Respondent to discuss the termination of Agnant, and other matters.

Union agent Langston arrived prior to 9:30 a.m. and spoke to employees in the downstairs maintenance area. At 9:30 a.m., Callahan advised Langston that he should not be downstairs, that the meeting was upstairs and he was to go upstairs. Langston replied that he would be at the meeting at the scheduled time of 10:00 a.m., and advised him that he would meet with the employees until the meeting began. Callahan again directed him to go upstairs immediately and Langston refused.

Union president See arrived at 9:30 or 9:45 and immediately went to the downstairs maintenance department to speak with the employees concerning the grievance. He stated that he was told by shop chairperson Otocka that Callahan called and said that See "could not be downstairs." See said he had the right to meet with the men downstairs, and that he had always done so. See told Otocka to relay the message that if Callahan had a "problem" with that, he should call the police and have him removed. About five minutes later, See went upstairs to the meeting. See conceded that he did not announce himself in the office before going down to the maintenance area, and he had never done so. Otocka testified that Callahan asked him why See was downstairs. Otocka replied that they were discussing the issues to be raised at the meeting. Callahan answered that such a meeting could not take place in the maintenance area, and that he wanted them to meet upstairs. Brown, the shop steward, was a part of the meeting with Langston and See.

Langston, See and Otocka testified that prior to October 19, See had never been prohibited from meeting with employees in the downstairs maintenance area prior to a grievance meeting. Langston stated that during Callahan's tenure the Union has met with employees for membership meetings in the community hall upstairs, after having obtained permission for such meetings.

At the meeting, See asked whether the Respondent intended to eliminate the boiler room employees and also inquired about the presence of asbestos in working areas. Callahan refused to respond to those inquiries. Callahan justified the termination of Agnant on the basis of a study he did on Agnant's job. See asked for a copy of the study and Callahan said that he is not entitled to it. See announced that the meeting was going "nowhere", suggested that Callahan retain an attorney and left the room. As they left, board member Hank Skonieczny said that

[3] The relevant parts of the meetings are summarized herein, and are at times composites of the meetings taken from several witnesses, which represent what I find was said at those meetings.

See should not let "the door hit you in the ass on your way out." Marcinczyk, the president of the board of directors, was at that time a current member of the Union while employed at the Milford Jai Alai, and generally believed that See did not represent the employees there aggressively. He asked See if dues would be continued to be deducted from their salaries at Milford, apparently since it was due to close in two months. See refused to answer, saying that the Milford situation had nothing to do with this meeting. See denied saying that he hoped that the Respondent had a lot of money to pay its attorney. [4]

About four members of the board of directors were present at this meeting. See questioned the number of board members, saying that he usually met with fewer members. According to Marcinczyk, See verbally "attacked" Callahan, asking him in a disrespectful and rude voice whether he had the authority to bargain in behalf of the Respondent, and threatening that the Union would "run up the legal bills."

See testified that after leaving the meeting, he spoke to Otocka in the maintenance area. Marcinczyk approached and said "you fuck those people in the jai alai, you're going to fuck these people, and as long as I'm president, for as long as I'm president I'm going to get rid of this union." See cursed at him. Otocka gave uncontradicted testimony that he heard Marcinczyk say essentially that "he was going to do everything he could in his two year term of office to get rid of Russ [See] and the UAW."

Following the conclusion of the meeting, Marcinczyk realized that See had been in the maintenance area for 15 to 20 minutes, and became further annoyed that See had, for the second time that day been in the maintenance area. Marcinczyk went downstairs, and asked See to "respect our wishes" and meet upstairs. He stated that See "picked a fight" with him, "one thing led to another" and "words were exchanged." He conceded saying "as long as I'm . . . on the board . . . I would beat him at his own game."

Marcinczyk testified that he asked that See not meet with the men in the maintenance area because "we didn't . . . like the idea of them down in the maintenance room. A lot of things could happen and none of them were good." He further stated that the Respondent had the right to designate a place for the Union to meet with the employees, and that he mistrusted See, that he "would do something amiss in . . . maintenance area." He testified to an altruistic purpose, however, in asking See to meet upstairs in a private room in the community hall—to provide See and the employees with "privacy" in a closed room. Langston denied that Callahan asked him to meet with the employees in the community room upstairs.

Callahan, essentially corroborating Marcinczyk's testimony, added that the practice prior to that time, apparently had been to permit See to do "whatever" he wanted when he wanted. However, upon Callahan's becoming the property manager, "we were looking at all aspects of how we manage" the Respondent's operations, including See's meeting with employees. Callahan's point was that the contract did not provide that the Union had the right to enter the property and meet with employees in the maintenance area during work time. Regarding the substance of the meeting, Callahan stated that See's questions were of an "attacking nature" and See apparently did not listen to Callahan's responses. See told Callahan that "you and I are going to have a good time together," adding that the Union had more money than the Respondent.

[4] Langston stated that since WC&F arrived, the number of grievances filed has increased. He stated that they were filed in order to defend the Union's position, not to harass or bankrupt the Respondent.

b. The Alleged Denial of Access to Union Agents Prior to the October 19 Meeting

It is alleged that, based on the above, conduct, the Respondent unlawfully denied Union representatives access to work areas on October 19 in violation of Section 8(a)(1) of the Act. It is thus not alleged that the denial of access constituted a unilateral change in past practice in violation of Section 8(a)(5) of the Act. Rather, it is alleged that the Respondent's conduct interfered with employee Section 7 rights.

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), the Supreme Court held that an employer could lawfully prohibit nonemployee union organizers from distributing union literature on the employer's parking lot if (a) reasonable efforts through other available channels of communication will enable it to reach the employees and (b) the employer does not discriminate against the union by allowing distribution of items by other nonemployees. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533–534 (1992), the Court extended *Babcock & Wilcox* to a customer parking lot, and held that the employer's property right must yield only where there are extraordinary barriers to communication with the employees. Only after the union makes a threshold showing that the location of a plant and the living quarters of the employees place them beyond the reach of reasonable union efforts to communicate with them, does a balancing test between the employer's private property rights and the employee's need for information about their Section 7 rights take place. See *Holyoke Water Power Co.*, 170 NLRB 1369, 1370 (1985).

Here, there has been no showing that the Union was unable to meet with the employees outside of the employer's property in order to prepare for the grievance session. Accordingly, the Respondent properly denied access to the Union to the work areas of its property on October 19. *Kay Fries, Inc.*, 265 NLRB 1077, 1093 (1982), and *General Electric Co.*, 160 NLRB 1308, 1312 (1966), relied on by the General Counsel, are inapposite. In both cases, the contracts gave the union representative a right of access to the plant. Here, in contrast, there is no contractual provision permitting access, and, indeed, the Union was given access to the facility for the purpose of attending the grievance session.

Accordingly, I will recommend that this allegation of the complaint be dismissed.

c. The Meeting of October 26

This meeting was attended by Callahan and Marc Zaken, the attorney for the Respondent, several board directors, and Langston, See, and shop steward Dennis Brown. Board member Joe Olbrys had a laptop computer and See asked what he was doing with it. According to Langston, Olbrys replied "any fucking thing I want to do." Zaken answered that he could use a

laptop in lieu of taking written notes. See stated that only one board member could be present and asked that all other members leave. Zaken replied that all the board members had a right to be present. The Union representatives then left the meeting.[5] Langston supplied another reason for the Union's departure. He said that each time Callahan answered a question, the other board members cheered or applauded, calling out "you tell them." As the Union agents left, board member Skonieczny told them not to let the door hit them in the "ass". See essentially corroborated Langston's version of this meeting, as set forth above. Callahan denied that board members were cheering or applauding, but he did concede that the meeting was a "zoo", attributing it to See's unprofessional attitude and confrontation with the board. Employee Brown stated that as the Union agents left, the board members applauded and made other noises. According to Brown, See asked Zaken if he approved of the board members' behavior. Zaken said he did.

d. The Meeting of December 7

On December 6, Langston faxed a letter to Callahan which stated that the Union would not meet if the Respondent had more than one board member present. When Callahan received the fax he immediately called and faxed the Union, saying that since the board intended to have more than one member present, the December 7 meeting was cancelled. Although Brown was aware that the meeting was cancelled he could not reach any of the Union agents. Apparently the Union did not get these messages and Langston and See entered the office for the meeting. Callahan told them that the meeting was cancelled.

I credit the testimony of Langston and See that, as they left the office and stood on the visitor side of the rent window, board member Marcinczyk yelled at See that he should tell the employees here how he "fucked us over at jai alai", caused it to close, and that he would "end up fucking this place up" as he had at Milford." See replied that he was "not fucking this place. If anyone is fucking this place you are." Marcincyk then called See an "asshole." See asked if he wanted to "take this outside?" Board member Skonieczny then slid the rent window shut, after which Marcincyk told See that his "mother is an asshole."[6]

Employee Boulware testified that she heard Marcinczyk tell See "why don't you tell them what you did to us at the Jai-Alai, you sell us out?" See called Marcinczyk a "jerk", and Marcinczyk replied "like your mother." See asked him to repeat that remark outside, at which time the rent window was then closed by a board member. Marcinczyk testified that he was upset at losing his job at the Milford Jai Alai, and resented See for doing nothing for the workers there while fighting so hard for the Respondent's employees.

On December 10, the Union sent a letter which stated that due to the disregard of the third step grievance procedure and the "shameless, unprofessional behavior" of the board members at the last three third step grievance meetings, and in order "to circumvent further hostility, the Union would refer all present and future grievances to arbitration.

The complaint alleges that on about December 7, 2001, Marcinczyk disparaged Union representatives in the presence of unit employees.

I credit the mutually corroborative testimony of the General Counsel's witnesses that Marcinczyk yelled that See would destroy the Respondent as he had Milford, and made a scurrilous remark about See and his mother. Employee Boulware was present during this exchange. Although she did not testify to Marcinczyk's remarks that See would destroy the Respondent, she did say that Marcinczyk accused See of "selling out" the employees at Milford.

I find that Marcinczyk's remarks were not merely personal, as asserted by the Respondent, but were an effort to denigrate the Union in the eyes of the employees. By telling See in Boulware's presence that he would destroy the Respondent, and by calling See vulgar names, Marcinczyk undermined the Union. Such comments had a reasonable tendency to interfere with employees' rights to remain represented by the Union. *Dayton Hudson Corp.*, 316 NLRB 477, 483 (1995); *Domsey Trading Corp.*, 310 NLRB 777, 793 (1993); *Lehigh Lumber Co.*, 230 NLRB 1122, 1125 (1977). I reject the Respondent's argument that See was at fault because he invited Marcinczyk outside. That invitation came only following Marcinczyk's improper remarks. I accordingly find and conclude that the Respondent violated Section 8(a)(1) of the Act by disparaging the Union, as alleged.

4. The Collective Bargaining Sessions[7]

a. The Meeting of May 15, 2002

The parties exchanged proposals for a new contract and discussed them. The Respondent's proposal consisted of the expiring contract with "redlining", indicating the changes it sought. See asked for a separate document containing just the changes desired, and the Respondent agreed to supply it, and did so prior to the next meeting. It was agreed that the economic issues would be discussed during final bargaining. The session lasted one to one and one-half hours.

Callahan stated that at some point during the meeting, See used the word "fuck." Callahan noted, however, that See did not direct that word toward anyone in management. Callahan's pre-trial affidavit did not mention that obscenity. Zaken responded that he sought a very professional meeting and did not want any profanity. See conceded that he told Zaken that he (See) had taught a lot of young attorneys over the years and he would teach Zaken too. Callahan said that the Respondent asked for certain information such as the Union's proposed

[5] The Union's claim was based on its reading of the grievance procedure set forth in the contract. It provides that Step 3 grievances would be addressed by the "representative" of the board of directors. A later arbitration decision held that more than one director may be present.

[6] Langston stated that both men were "in the heat of anger" and that See's comment may be interpreted as an invitation to fight, but he did not believe that a fight was about to ensue.

[7] There was disagreement over where the sessions would take place. The Union wanted to meet at Success Village and the Respondent refused. The Respondent suggested using its attorney's office, or sharing the cost of renting a hotel room, and the Union refused. The sessions were held either at city hall or at the Connecticut State Board of Arbitration.

pension plan, and job descriptions. Neither was forthcoming during the negotiations.

b. The Meeting of May 23

Each party explained their proposals and answered questions about them. The meeting ended when the Union requested a two-hour lunch break after which they would resume negotiations for 30 minutes. The Respondent suggested a shorter break, but the Union refused. Callahan described the meeting as non-productive. On May 31, the contract expired.

c. The Meeting of July 15

The parties spoke about vacations, and a brief discussion was held concerning asbestos in the workplace. Callahan described the meeting as non-productive.

d. The Meeting of July 22

See asked if the Respondent's workers' compensation carrier had changed. Zaken said that he did not know and took a break to call the office. When he returned, Zaken said that he would find out the answer and inform the Union later in the week, and he did so.

See was then given a copy of a medical questionnaire concerning asbestos which had been given to certain employees three months previously, in April. The six-page document contained numerous questions concerning the medical condition of the employee and type of job functions performed. The Union took a 40-minute break to examine it.

Langston testified that upon their return to the room, See apologized for taking so long, explaining that the questionnaire was very lengthy. Zaken then asked what took so long, and See asked him whether he was deaf. Zaken got agitated, said he did not have to take such language, closed his file, stood up and announced that he would contact a mediator. See asked what the problem was, and Zaken said that he did not have to take such insults. See replied that he did not insult Zaken, adding that if had called Zaken an "asshole" that would be an insult. Zaken then asked whether See was calling him an "asshole" and See replied that he was not calling him such a name, but that "maybe you are an asshole." Zaken said that he would call the mediator, and he and his committee left. See essentially corroborated Langston's account.

Callahan testified that See called Zaken an "asshole" during the meeting, and with that, Zaken said he would not meet if See used offensive language, and the Respondent then left.

Following the meeting, Zaken wrote to See, stating that See used foul language toward him during their May 15 meeting. Referring to the July 22 meeting, Zaken gave his version of See's conduct at the meeting as follows: See called him an "asshole," said he would continue to use foul language toward Zaken, and asked Zaken "what are you going to do about it, walk out?" Zaken replied that he would not tolerate such language and would leave if he continued to make personal insults, and See responded "go ahead and walk out, you asshole." In a letter to mediator Thomas Sweeney, Zaken said that the parties remain "very far apart in their positions, and the process has been marred by personal insults and threats" from See.

One month later, See wrote to Zaken, conceding only that when Zaken accused him of attacking him, he (See) asked what he would do if he called him an "asshole," whereupon Zaken left. See's letter also stated that Zaken could not answer questions concerning the Respondent's proposals and, when answering, gave only vague replies. See concluded that he was "not too concerned about [Zaken's] objection to abusive language. If you are that thin skinned maybe you should look into another line of work." He also looked forward to having a mediator present because Zaken needed "all the help [he] can get." In his reply, Zaken stated that he believed that a mediator was necessary to prevent a continuation of the Union's abusive language and bad faith bargaining. Langston testified that foul language, set forth above, "marred" the parties' relationship during the Fall, 2001, agreeing that it was a "problem."

e. The Meeting of August 29

This meeting was held at the Connecticut Board of Arbitration. The Respondent arrived first and met with mediator Sweeney for about one hour, outlining the history of the parties' negotiations up to that point, and informing him that "no fruitful discussions regarding anything had taken place." Zaken testified that he spoke to Sweeney on "areas that I thought we might be able to make some progress if Mr. See would negotiate with us on them." When the Union's agents arrived, Sweeney asked them to wait in another room.

Sweeney met with the Union and asked if the matter could be resolved. See replied that the parties were very far apart, and had not even discussed certain issues. See asked that Sweeney get the parties together to begin bargaining. Sweeney reported that the Respondent refused to meet for face-to-face negotiations and insisted on bargaining in separate rooms with Sweeney acting as the intermediary. See told Sweeney that lengthy negotiations are necessary to arrive at a new contract, which could not be accomplished by bargaining separately. See gave as an example the issue of subcontracting. Sweeney left and returned, saying that the Respondent does not intend to subcontract all unit work. See replied that they must meet together since he did not even know what work the Respondent wants to subcontract, adding that they must deal across the table so that the Union knows what the Respondent is talking about.

Zaken testified that he told Sweeney that based on the history between the parties, face-to-face bargaining had been unproductive. Zaken testified about a private conversation he had with Sweeney, in which Sweeney told him that See mentioned privately to Sweeney that he wanted to meet face-to-face so that he could call Zaken an "asshole" which would cause Zaken to leave the meeting, permitting See to file a charge against the Respondent. Callahan and Marcinczyk testified that Zaken related that conversation to them. That information contributed to the Respondent's decision thereafter not to meet in person with the Union.

Zaken testified that even before this meeting he believed that the parties must meet in separate rooms because of See's prior conduct, the long breaks taken by the Union, the filing of charges, and "because of all of the things that had gone on."

See denied being alone with Sweeney that day, and further denied telling him that he wanted to have a face-to-face meeting with Zaken because he wanted to call him an asshole and

then file a charge. See stated, however, that at the end of the meeting, Sweeney said that the Respondent was refusing to bargain, apparently by refusing to meet face-to-face with the Union. See then told him that he would file a charge against the Respondent. See added that he has known Sweeney for 20 years, and had never told him what a company attorney told him in confidence.

Langston testified that he was in See's presence during their entire session that day, and did not see the mediator engage in a private discussion with See. He added that anytime See spoke with the mediator, he (Langston) was present. He specifically denied hearing the comment allegedly made by See to Sweeney.

Following the meeting, the Union wrote to the Respondent demanding face-to-face negotiations, explaining that the parties had not fully discussed their proposals, the Respondent had not given its reasons for wanting changes in the expired contract, and negotiations had not progressed to the point where a mediator was necessary. In response, Zaken wrote on August 29 that the Respondent would bargain with the Union in separate rooms with the assistance of the mediator to communicate their positions. No bargaining sessions were held after August 29.

C. The Violations of Section 8(a)(5) of the Act

1. Impasse and the Implementation of the Respondent's Proposals

The Respondent continued to insist that bargaining be conducted in separate rooms with the assistance of the mediator. The Union refused to do so. On September 30, 2002, Zaken wrote to the Union that given the unwillingness of the Union to meet in separate rooms "it is apparent that our negotiations are at an impasse." Zaken advised that, effective October 10, it would implement its proposals made to the Union at the initial bargaining session of May 15, unless "in the interim we receive notification . . . that the Union is willing to meet with Success Village on the terms described above [bargaining with the parties in separate rooms]." Zaken further noted that since no wage proposal was made during negotiations, the Respondent would maintain the status quo with respect to wages.

On October 16, the Respondent wrote to its employees that, inasmuch as the Respondent and the Union have reached an impasse in their contract negotiations, the Respondent "is thus unilaterally implementing its last best offer." In October, the Respondent eliminated the positions of Boilerman 1A, leadman, and temporary leadman, and Giannattassio was terminated because he was unable to report to work for more than six months. All those actions were consistent with its proposals for a new contract. Callahan testified that not all of its proposals were implemented.

Callahan further testified that the Respondent did not believe that there was any point in continuing negotiations with the Union. They had met face-to-face and "nothing was really accomplished. There were obscenities and it just wasn't going to get anywhere."

See stated that when negotiations ended, the parties had not discussed, at length, any one issue. Langston testified that since July 22, the Union had not received from the Respondent proposed language concerning its four hours pay proposal, and information concerning the pension plan and job descriptions that it had requested. See testified that when negotiations ended, not all of the Respondent's proposals had been discussed. For example, the Respondent sought to change the weekly payday to biweekly paydays. At the July meeting, See asked why the change was necessary, and Zaken replied that it would save it money. See asked how much money would be saved, and Zaken said that he did not know but would have that information at the next meeting, but no substantive discussion took place thereafter. See noted that, in the past, he has participated in face-to-face negotiation sessions with the Respondent with a mediator present.

a. Analysis and Discussion

The complaint alleges that on August 29, 2002, the Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to conduct negotiations in separate rooms through an intermediary, that such condition is not a mandatory subject of bargaining, and that, in support of that condition, the Respondent bargained to impasse and implemented its contract proposals.

"It is elementary that collective bargaining is most effectively carried out by personal meetings and conferences of parties at the bargaining table. Indeed, the Act imposes this duty to meet." *U.S. Cold Storage Corp.*, 96 NLRB 1108 (1951). Section 8(d) of the Act defines the duty to bargain collectively as the mutual obligation of the parties to "meet . . . and confer in good faith. . . ." See *Twin City Concrete*, 317 NLRB 1313, 1314 (1995); *Chemung Contracting Corp.*, 291 NLRB 773, 784 (1988); *The Westgate Corp.*, 196 NLRB 306, 313–314 (1972). An employer may not insist that negotiations be conducted by phone or by mail. *Alle Arecibo Corp.*, 264 NLRB 1267, 1273 (1982). The Board has held that "an employer who insists on negotiating by mail or demanding that a union submit its proposals in writing, has unlawfully refused to bargain." *Beverly Farm Foundation*, 323 NLRB 787, 793 (1997).

The Respondent's insistence on bargaining through a mediator and not in face-to-face sessions does not satisfy its bargaining obligation. Such a procedure does not permit a complete give-and-take of ideas and proposals. As noted by See and Langston, there were many issues which still required full discussion. Bargaining through a mediator would inhibit the free flow of ideas from both sides which could result in an agreement. Such bargaining also would not permit the parties to simultaneously sign-off on tentatively agreed-upon terms in the middle of bargaining, or hold sidebar conferences with the other party's negotiators. Separate-room bargaining would not permit one party to fully articulate its position as to a complex issue and follow-up with a further explanation if needed. Nor could the other side be in a position to immediately respond to such explanation with concerns of its own. Such bargaining would also remove the possibility that each side would be able to observe the body language of, or maintain eye contact with the opposition.

It is more likely that an agreement would be reached where there is a free flow of ideas between the parties, and an opportunity for the parties to reason with each other as to the merits of their proposals. None of these opportunities are available

when the parties are bargaining through a mediator with no opportunity for face-to-face contact.

I find, as alleged in the complaint, that the Respondent insisted, as a condition of reaching a collective-bargaining agreement, that the Union agree to conduct negotiations in separate rooms through an intermediary. In its letters of August 28 and September 30, the Respondent insisted on such a bargaining arrangement as a condition of continuing negotiations. When the Union refused to do so, the Respondent declared impasse, and announced that it would implement its proposals unless it was notified that the Union was willing to meet with Success Village in separate rooms with the mediator as an intermediary.

The Respondent could not lawfully insist on such bargaining as a condition of meeting with the Union. Bargaining in separate rooms through an intermediary is not a mandatory subject of bargaining, but rather is a permissive subject, as to which the Respondent could not insist to impasse. *Riverside Cement Co.,* 305 NLRB 815, 818 (1991).

I accordingly find and conclude that the Respondent's insistence on bargaining only through a mediator in separate rooms and not in face-to-face sessions violated the Respondent's bargaining obligation.

I further find that no legitimate impasse in bargaining was reached by the parties. In *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1979), the Board set forth several factors for determining whether impasse has been reached:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

After considering the relevant factors, the Board will find that an impasse existed at a given time only if there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *Cotter & Co.,* 331 NLRB 787 (2000). It is clear that the Union believed that further negotiations might produce agreement. Union officials testified that there were a number of items which had not yet been discussed and other matters had not been fully explored by the parties. An impasse can exist only if both parties believe that they are "at the end of their rope," and where neither party is willing to compromise. *Cotter & Co.,* above, at 788. "A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Hi-Way Billboards,* 206 NLRB 22, 23 (173). If the parties had an opportunity to engage in further bargaining it is possible that agreement could be reached. After only four unproductive meetings it can hardly be said that the parties were deadlocked as to any issue. Indeed, there was hardly any discussion at all. Based on that, given further negotiations, compromises were possible and it is also possible that agreement could be reached.

In addition, "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices. . . . An employer that has committed unfair labor practices cannot 'parlay an impasse resulting from its own misconduct into a license to make unilateral changes." *Dynatron/Bondo Corp.,* 333 NLRB 750, 752 (2001). Only "serious unremedied unfair labor practices that affect the negotiations" will taint the asserted impasse." *Titan Tire Corp.,* 333 NLRB 1156, 1158 (2001); *Alwin Mfg. Co.,* 326 NLRB 646, 688 (1998). It is clear that here, the Respondent's unfair labor practice of conditioning bargaining on negotiations occurring in separate rooms through a mediator obviously affected the negotiations. The Respondent would not bargain unless that unlawful condition was met. When the Union refused to agree to that unlawful condition, the Respondent effectively foreclosed bargaining from continuing. No better example of an unremedied unfair labor practice affecting the negotiations can be cited. Accordingly, the parties were unable to reach agreement, or even bargain toward that end, because of the existence of this unremedied unfair labor practice committed by the Respondent. *Jano Graphics, Inc.,* 339 NLRB 251 (2003).

The Respondent argues that it bargained in good faith with the Union, but reached an impasse when it became apparent that further negotiations would be futile. The Respondent contends that the Union's approach to bargaining from the very beginning evidenced a desire to avoid good faith bargaining or reach agreement. It asserts that it declared an impasse because the Union's conduct during the four negotiation sessions and the mediation session established that the Union had no interest in legitimate bargaining.

The Respondent asserts that the bargaining session of July 22 at which See allegedly called Zaken an asshole convinced the Respondent that the parties were at impasse and would not have been able to make further progress without the assistance of a mediator. It is true that the parties did not make much progress in the four bargaining sessions held. But the parties did exchange proposals and discussed them. Productive, substantive discussion on the proposals had not yet taken place when the Respondent prematurely declared impasse. *Grosvenor Resort,* 336 NLRB 613, 615 (2001).

There can be no doubt that See is a confrontational person, and that he approached the negotiations without the diplomacy of a foreign ambassador. However, no one expects labor negotiations to be conducted in the sitting room of the Harvard Club by persons having a gracious, gentle manner. "For better or worse, the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior." *Victoria Packing Corp.,* 332 NLRB 597, 600 (2000).

However, nothing in See's conduct, or in the conduct of the Union establishes that the Union engaged in any misconduct as to interfere with the mechanics of collective bargaining. *Langston Cos.,* 304 NLRB 1022, 1072 (1991). The General Counsel cites cases where the employer refused to meet with a particular union representative. *KDEN Broadcasting,* 225 NLRB 25 (1976); *King Soopers, Inc.,* 338 NLRB 269 (2002). In such cases, "an employer is justified in refusing to meet with a particular union representative if there is 'persuasive evidence

that the presence of [that individual] would create ill will and make good faith bargaining impossible.'" *King Soopers*, above. Those cases hold that the employer is justified in refusing to meet with a specific union negotiator if the agent engaged in violent, physical conduct. No such conduct took place here. Indeed, in *Long Island Jewish Medical Center*, 296 NLRB 51, 71–72 (1989), the Board found that a union agent who slightly pushed a hospital administrator and called her an asshole on several occasions did not create ill-will or make bargaining impossible.

In any event, the Respondent is not offering to bargain with the Union without See present. It argues that the Union's conduct relieved it of its obligation to meet with the Union at all in face-to-face bargaining. The record does not establish that the Respondent may impose that demand.

Nothing in the Union's conduct relieved the Respondent of its obligation to bargain in good faith with the Union. The Respondent cites certain charges filed by the Union which were dismissed. However, others had merit and are the subject of this proceeding. Bargaining had barely begun when the Respondent prematurely declared impasse. The bargaining history of the parties demonstrates that, although negotiations leading up to prior contracts were lengthy, they always reached agreement. I cannot credit the Respondent's witnesses that See told mediator Sweeney that the only reason that See wanted face-to-face bargaining was to call Zaken an asshole so that the Respondent would walk out of the meeting. The evidence does not establish that the Union sought to avoid reaching agreement. It presented its proposals to the Respondent, attended bargaining sessions, and engaged in discussions concerning its proposals and the Respondent's proposals. After the Respondent refused to meet in face-to-face bargaining, the Union continued its efforts to convince the Respondent that it sought in-person bargaining and gave its reasons as to why such a method was necessary.

The other factors cited by the Respondent as evidence that the Union was not interested in bargaining, and which allegedly justified its declaring impasse similarly have no merit. The facts that the Union may have arrived late at negotiation sessions, took long lunches, ended sessions early, and did not furnish requested information do not establish, separately or together, a desire not to reach agreement. It should be noted that the Union claims that the Respondent did not furnish information it requested.

Inasmuch as I find that no good-faith impasse occurred, I therefore find that the Respondent was not entitled to implement its contract proposals. *Dynatron/Bondo Corp.*, above. It follows, accordingly, that it cannot rely upon its implemented contract proposals to support the various changes it made in the terms and conditions of employment of its employees, discussed below.

2. The Respondent's Obligation to Bargain with Respect to Changes in Employees' Terms and Conditions of Employment

Inasmuch as I have found that no proper impasse in bargaining occurred, I therefore find that the Respondent was unable, legally, to implement its contract proposals. It thus follows that the Respondent cannot rely upon its implemented contract proposals to support the various changes it made in the terms and conditions of employment of its employees.

The Respondent also argues that the Union waived its right to bargain concerning the changes by virtue of certain clauses in their collective-bargaining agreement, specifically, the management-rights clause, the "zipper clause", a clause prohibiting any prior practice except those specifically enumerated, and clauses concerning waiver of a breach of the agreement, and providing that no act or omission of the Respondent shall be used to establish a past practice of the parties. The relevant provisions of the contract are as follows:

> Article 2—Management:
> It is agreed that the rights of the management of the Co-op have been bargained and that, except as otherwise provided by this agreement, the Co-op retains the sole and exclusive right to fully manage and conduct its business affairs, which rights include specifically, but not being limited to, the following: the exclusive right to fully direct and assign its employees, including but not limited to, the right to hire, promote, demote, transfer, lay off for lack of work or other business reason deemed sufficient to the Co-op; discharge or discipline for just cause, and to maintain discipline among employees; the determination of services to be performed; the standards of quality of work to be maintained; the type and quantity of machines, tools, equipment and methods to be used; to maintain and enforce rules of conduct and safety; to introduce changes in methods; to establish work standards; to determine the size of its work force; to determine the number of hours per day or per week operations shall be carried on; to allocate or assign work; and to generally manage the Co-op's business as it deems best.
>
> Article 18, General Provisions:
> Section 6—This agreement constitutes the entire contract between the Co-op and the Union, and settles all demands* and issues with respect to all matters subject to collective bargaining. Therefore, the Co-op and the Union, for the duration of this Agreement, waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter which is subject to collective bargaining, whether or not such subject is specifically referred to herein.
>
> Section 7—No prior policy, practice or procedure of the Co-op shall be required to be continued except for those specifically enumerated in this Agreement, including the Appendix B. This provision (and Sections 8 and 9 of this Article) shall not apply to the issue of subcontracting and transfer to [sic] work, which shall continue as heretofore. Thus, the Union and/or the employee shall have no right to demand of the Co-op anything not provided for in this Agreement.
>
> Section 8—The waiver of any breach or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all the terms and conditions herein.
>
> Section 9—No act or omission of the Co-op prior to the signing of this Agreement or during this Agreement shall be used in any way to establish any "past practice" of the parties.

Appendix B contains a list of 15 paragraphs providing for various terms and benefits for employees including permitting a washer/dryer, locker room, lunch room, and radio and television set in the maintenance area; and providing that if a holiday falls on a Friday, payday will be on Wednesday.

I begin with a discussion of the legal principles applicable to alleged unilateral changes. I will then apply the law to the specific changes alleged.

An employer's duty to bargain with the union representing its employees encompasses the obligation to bargain over the following mandatory subjects—wages, hours, and other terms and conditions of employment. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679–682 (1981). An employer violates Section 8(a)(5) of the Act when it makes a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining, at a time when the employees are represented by a union. *Fresno Bee*, 339 NLRB 1214 (2003). The General Counsel establishes a prima facie violation of Section 8(a)(5) when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971); *Taino Paper Co.*, 290 NLRB 975, 977 (1988). The burden is then on the employer to show that the unilateral change was in some way privileged. *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 628 (1990).

A "term and condition of employment," even though not expressly provided for in the collective-bargaining agreement cannot be unilaterally altered or abolished by the employer without affording the Union notice and an opportunity to bargain. Thus, a unilateral change constitutes an unlawful refusal to bargain unless, as the Respondent contends, the Union has waived its right to bargain over this matter. "The right to be consulted on changes in terms and conditions of employment is a statutory right; thus, to establish that it has been waived the party asserting waiver must show that the right has been clearly and unmistakably relinquished. Whether such a showing has been made is decided by 'an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement.'" *TCI of New York*, 301 NLRB 822, 825 (1991).

However, waivers of statutory rights are not to be "lightly inferred." *Georgia Power Co.*, 325 NLRB 420 (1998). "National labor policy disfavors waivers of statutory rights by a union and thus a union's intention to waive a right must be clear before a waiver can succeed." *C & P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2nd Cir. 1982). "We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000).

"The Board finds a waiver of the statutory right to bargain based on language contained in the contract if the contract language is specific regarding the waiver of the right to bargain regarding the particular subject at issue. Thus, the Board looks to the precise wording of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver." *Allison Corp.*, above, at 1365.

The Respondent argues that the Union, because it agreed to the zipper clause, waived its right to bargain during the term of the contract over mandatory subjects not addressed in the contract and not raised during bargaining. "The clear and unmistakable waiver test applies equally to alleged waivers contained in zipper clauses as it does to those contained in other contractual provisions." *Michigan Bell Telephone Co.*, 306 NLRB 281, 282 (1992).

The Board has held that a contract clause must specifically include the subject at issue and that the parties' bargaining history must show that the matter at issue was fully discussed and consciously explored during negotiations, and that the Union consciously yielded or clearly and unmistakably waived its interest in the subject matter before a waiver will be found. *Mt. Sinai Hospital*, 331 NLRB 895, 910 (2000), citing *Johnson-Bateman Co.*, 295 NLRB 180, 184–188 (1989). Here, none of the contractual provisions establish, on their face, prior union consent to the actions taken by Respondent, nor a waiver of the union's right to advance notice and an opportunity to bargain about such actions. *Mt. Sinai*, above. at 184. "Generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights.'" *Johnson-Bateman Co.*, above.

"In order to establish the waiver of a statutory right as to a specific mandatory bargaining subject, there must be clear and unequivocal contractual language or comparable bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union consciously yielded or clearly and unmistakably waived its interest in the matter. Absent such evidence, the Board has consistently found that a general management-rights clause does not constitute a clear, unequivocal, and unmistakable waiver by the union of its statutory right to bargain about an employer's implementation of a work rule not specifically mentioned in the clause." *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992).

> In general, a zipper clause is an agreement by the parties to preclude further bargaining during the term of the contract. If the zipper clause contains clear and unmistakable language to that effect, the result will be that neither party can force the other party to bargain, during the term of the contract, about matters encompassed by the clause. That is, the zipper clause will "shield", from a refusal to bargain charge, the party to whom such a bargaining demand is made. Similarly, under such a clause, neither party can unilaterally institute, during the term of the contract, a proposal concerning a matter encompassed by the clause. That is, the zipper clause cannot be used as a "sword" to accomplish a change from the status quo. *Michigan Bell Telephone*, above, at 282.

Here, as in *Pepsi Cola*, 241 NLRB 869 (1979), I find generally, as set forth below, that the Respondent used the zipper clause as a sword, and not as a shield, to "unilaterally institute" changes in terms and conditions of employment. The Respondent first unilaterally changed the employees' existing working conditions, then used the zipper clause as a "sword" to justify its refusal to discuss the unilateral changes made to the status quo.

A zipper clause does not mean that a union has clearly and unmistakably relinquished its right to bargain over all mandatory subjects of bargaining. Rather, the Board and the courts have interpreted such a clause as a curb on the union's right to demand bargaining during the life of a collective-bargaining agreement about the terms and conditions of employment which are contained in the agreement. The Board and the courts have not interpreted the presence of a zipper clause as a grant to an employer to unilaterally change existing terms and conditions of employment. See *GTE Automatic, Inc.*, 261 NLRB 1491, 1492 (1982); *Angelus Block Co.*, 250 NLRB 868, 877 (1980).

I cannot conclude that the zipper clause clearly and unmistakably waived the parties' rights to bargain over mandatory subjects not mentioned in the contract. There was no evidence of the specific matters discussed in negotiations leading up to the execution of the contract which expired in May, 2003. Where the zipper clause does not contain clear and unmistakable language, there is no waiver of the right to bargain. Each party has the right, and the opposing party has the duty, to bargain about subjects not covered by the contract and not discussed in contract negotiations. *Michigan Bell*, above.

It must also be noted that here, as in *Suffolk Child Development Center*, 277 NLRB 1345, 1351 (1985), in finding that a zipper clause did not act as a waiver, the Board noted that the benefits at issue continued for nearly 1½ years after the contract became effective, and thus the clause was not intended to strike all prior agreements. Thus, the Respondent permitted the practices which are alleged to have occurred, in the face of the various clauses. *Aeronica, Inc.*, 253 NLRB 261, 264–265 (1980).

Applying the above principals generally to the changes instituted by the Respondent, I can find no specific language in any of the contractual clauses, except for subcontracting which will be discussed below, which refers to the "particular subject at issue." The clauses are all worded generally. For example, the management-rights clause, set forth above, speaks generally about the Respondent's ability to run its business, but does not expressly mention the new policies at issue here, such as the phone use policy, copier and facsimile use policy, time card discrepancy policy, reduction of paid time for Union officials, and the lock and locker policy. The zipper clause is also phrased in general language. The clause which states that no prior practice will be required to be continued except those specifically enumerated, similarly does not identify which prior practices must be discontinued.

E. I. du Pont & Co., 294 NLRB 563 (1989), relied on by the Respondent, is easily distinguishable. The changes implemented by the employer in that case were all the subject of proposals made to the union during the term of the agreement, and as to which, the employer offered to bargain about. In addition, the past practice urged by the union in that case conflicted with specific terms of the contract which involved employees engaged in union representation during working time. The circumstances in that case are thus completely different than the instant case in which no offer to bargain was made, and no specific term of the contract mentioned the express changes made here.

As set forth above, I cannot find that the Union by such general language in the contractual terms, clearly and unmistakably waived its right to bargain about these long-standing practices, or consciously yielded its interest in these matters.

a. The Changes in Working Conditions

The complaint alleges that (a) in October, 2001, the Respondent implemented a restricted phone use policy (b) on January 14, 2002, implemented a copier and facsimile use policy (c) on July 23, 2002 implemented a time card discrepancy discipline policy (d) since about December 20, 2002, it reduced the paid time for Union officials engaged in representation functions and (e) on July 3, 2003, implemented a locker and lock policy. It is alleged that the Respondent took these actions without affording the Union an opportunity to bargain with it regarding these changes.

i. The Phone Use Policy

A telephone had been located in the downstairs maintenance area in building 100—an area used by the employees. During Langston's tenure as shop steward he used the phone to make occasional long distance calls to the Union office in Newington, Connecticut. In connection with his work as a boiler tender, he also used that phone to make long distance calls to order parts. Prior to the hire of WC&F, the prior management company, Van Court, gave each employee a four-digit code to use when making a long distance call. That system held each employee accountable for such calls made by him. The change was necessary due to long distance calls being made which were unrelated to union business or work matters.

At a board meeting in September, 2001, it was decided that only the management, including the board, and clerical employees Boulware and Johnson would be permitted to make long distance phone calls. It was also decided that any employee who made long distance calls without prior permission would be written up and required to pay for the call. Union agent Langston testified that beginning in September, the downstairs phone was no longer capable of making long distance calls. In order to make business-related calls, the employee had to use the phone in the upstairs office—either in the manager's office or on the clerical employees' desks. For personal long distance calls, employees could no longer use the Respondent's phone either downstairs or upstairs. They were required to use a pay phone in the office foyer. However, Langston also testified that the employees may use the phone downstairs to make local calls, including calls to his cell phone which is a local call. Langston stated that the Union received no notice or opportunity to bargain with the Respondent before the implementation of these new policies.

Employee Otocka stated that he had always used the phone downstairs to call the Union. Upon the change, he was told by

the Respondent that he would have to use the pay phone in the manager's office to make such a call.

Callahan testified that the board examined the Respondent's office phone bills, and found that such bills were $250 to $300 per month. He said that employee Agnant had been making unauthorized long distance calls. The Respondent changed the phone code system so that the only persons who had the codes would be management and the two office employees, Boulware and Johnson. If maintenance employees had to make a long distance call they would have to come to the office and a manager would dial the number. Callahan testified that the downstairs phone continued to be able to transmit and receive local calls, and that union representatives were able to make such calls from that phone. He stated that a long distance call to the Union office is unrelated to the employee's job, further noting that the Respondent did not recognize any past practice that was not provided for in the contract, and that the making of long distance calls by union representatives is not included in the contract.

As set forth above, in September, 2001, a new rule was implemented, restricting employees' use of the phone by prohibiting their making long distance phone calls without permission. Prior to the September, 2001, no written rule existed concerning this matter, and employees were permitted to make such calls. Specifically, long distance calls to the Union's office were permitted prior to the new rule.

"An employer has a duty not to change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *NLRB v. Katz,* 369 U.S. 736, 745–747 (1962). An employer may not unilaterally eliminate a past practice, even if the practice has not been embodied in a term of a collective-bargaining agreement. *Arvinmeritor, Inc.*, 340 NLRB 1035,1039 (2003). But the activity must be "satisfactorily established by practice or custom, an established practice, a long standing practice." *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988).

A policy regarding telephone usage is a mandatory subject of bargaining. *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 903 (2000); *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 122 (1997). In *Santa Rosa Blueprint Service*, 288 NLRB 762, 764 (1988), the employer's reason for limiting the use of the phone was similar to that here—increased phone bills. The Board found that the "change in telephone policy 'affected all employees and constituted a substantial modification of a privilege which had been an existing condition of employment,'" citing *Brown & Connolly, Inc.*, 237 NLRB 271, 281 (1978); See *Advertising Mfg. Co.*, 280 NLRB 1185, 1191 (1986).

The use of phones by employees was therefore a term and condition of their employment, and thus a mandatory bargaining subject which the Respondent was not at liberty to unilaterally alter without first notifying the Union and affording it an opportunity to bargain. *Illiana Transit,* above; *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 903 (2000).

It is undisputed that the employees were permitted to make long distance calls to the Union prior to the change. It appears to have been a long-standing practice. Such use was discontinued without notice to the Union. I find that the change was a "substantial modification of a privilege which had been an existing condition of employment," *Brown & Connolly,* above. The fact that employees could continue to make local calls to Langston's cell phone does not alter the fact that the change was substantial. Langston's circumstances may change, and business agents may change, and the availability of his continued availability by local cell phone is uncertain. There is no reason that the Union should make accommodations in its availability simply because the Respondent changed this long-standing practice.

I accordingly find and conclude that the Respondent's unilateral institution of a new phone use policy violated Section 8(a)(5) of the Act.

ii. The Copier and Facsimile Use Policy

Callahan stated that, pursuant to a request by the Union for plumbing work orders, he turned over 300 to 400 documents to the Union. The Union did not ask for copies, but employee Teja came to the office, and began making copies of them. Callahan interrupted him, saying he could not make copies, and would have to pay for any copies made. Callahan further told him that such copies are costing the Respondent money, and that it had no obligation to make a copier available.

Immediately thereafter, on January 14, 2002, Callahan sent a letter to Langston stating that the plumbing work orders he requested were ready for his review, and that if the Union wanted copies, effective immediately, all copies made in the office would cost 25 cents per page, which may be made by employees after work hours. The letter further advised that Teja had been making copies and using the office fax machine, and that effective immediately, the fax machine "cannot be utilized."

Langston testified that prior to January 14, when such documents required copying, as the union representative, he made copies on the Respondent's machine, and had never been charged for copying. Also, prior to January 14, Union representatives were permitted to use the office fax machine.

Langston further stated that he received no notice of the change of policy prior to January 14, and that the Union had not been requested to bargain over the cost of copying or the use of the fax machine by union officers. Langston conceded that the expired contract does not mention use of the phone, fax or copier machine, nor did he believe that the contract was violated by the Respondent in imposing restrictions on their use.

As set forth above, on January 14, 2002, Callahan stopped employee Teja from making copies of documents requested by the Union and furnished by the Respondent, and imposed on the Union a fee for copies, and prohibited employee use of the fax machine. Previously, the Respondent did not charge the Union for making copies, and permitted employee use of the fax machine.

Similarly with respect to the phone policy, use of the copier and fax machines constituted a benefit to employees, which was withdrawn by the Respondent. The Respondent imposed this policy because Teja was making hundreds of copies, at a tremendous cost to the company. My finding, in this regard, is that even assuming the Respondent had a legitimate reason to impose the policy it could not do so without bargaining with the Union with respect to this mandatory subject of bargaining.

Treanor Moving & Storage Co., 311 NLRB 371, 383, 386 (1993).

I accordingly find and conclude that the Respondent's unilateral institution of a new copier and fax use policy violated Section 8(a)(5) of the Act.

iii. The Time Card Discrepancy Discipline Policy

On July 23, 2002, the Respondent sent a memo to its employees which stated that in the past several weeks there had been numerous time card errors—employees were not punching the time card correctly, and failed to punch at the required times. The memo stated that effective immediately, failure to punch the time card correctly would result in a written warning for the first occurrence and forfeiture of one-half hour's pay for the second occurrence.

This was a new policy which was issued without giving the Union an opportunity to bargain regarding it prior to its implementation. Callahan stated, however, that the Union did not request that the Respondent bargain about it. This is somewhat disingenuous since he admits that the board did not wish to speak to the Union prior to the issuance of the memo.

Langston testified there was no time card policy in effect prior to July 23. The only requirement was that the employee was required to punch in four times, and no discipline had been issued for not doing so prior to July 23. While employees had been disciplined for lateness prior to July 23, no employee had been disciplined for not punching in correctly, as set forth in the memo of July 23.

Callahan testified that the reason for the new policy was that the employees consistently failed to punch in correctly, either by double punching, or employees would forget to punch in. He emphasized that inasmuch as the workers are paid based on their time at work, accurate time card punching practice was essential. Prior to the issuance of the memo, he had spoken to the employees about this without issuing a written warning, but errors in the time cards persisted. Callahan noted that since the issuance of the memo, no employee forfeited pay due to incorrectly punching his or her time card. However, Netsel received a written warning pursuant to the new policy because he was chronically late and skipped punches in his time card.

As set forth above, on July 23, 2002, the Respondent implemented a time card discrepancy discipline policy in which the employees could be warned and lose pay if they fail to punch their time card correctly or fail to punch in at the required times.

There was no such rule prior to July 23. I reject the Respondent's argument that this was simply a "reaffirmation of existing practices." Although, prior to July 23, the employees were told of the need to correctly punch their cards, they were not subject to a written warning or forfeiture of pay if they did not do so. In addition, the fact that no one actually lost pay does not change the fact that they could suffer those penalties.

"It is well established that work rules that can be grounds for discipline are mandatory subjects of bargaining." *King Soopers, Inc.*, 340 NLRB 628 (2003). The Respondent's argument that the Union waived its right to bargain over this new rule by failing to request bargaining after it was issued, is without merit. "A union cannot be held to have waived bargaining over a change that is presented to it as a fait accompli. . . . An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Here, the new rule was implemented without any notice to the Union.

I also reject the Respondent's argument that the management-rights clause in the contract operated as a waiver of the Union's right to bargain about the implementation of this rule. The contract had expired on May 31, 2002, and the rule was implemented nearly two months later, on July 23. The Board has held that a management-rights clause does not survive the expiration of a contract. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001); *Ryder/Ate, Inc.*, 331 NLRB 889 fn. 1 (2000).

I accordingly find and conclude that the implementation of the new time card discrepancy discipline policy violated Section 8(a)(5) of the Act.

IV. THE REDUCTION OF PAID TIME FOR UNION OFFICIALS ENGAGED IN REPRESENTATION FUNCTIONS

On December 19, 2002, the Union sent a letter to the Respondent requesting that employees Reid and Teja "be excused on Union business" on December 20 from 11:00 a.m. for the rest of the day. The Respondent replied the same day as follows: "Please advise to the nature of the union business and the reason why their presence is required from 11:00 a.m. to the end of the day." The Union did not reply to the letter. Callahan stated that he did not normally respond to such a request for union leave by asking the nature of the union business the employee would be engaged in, however he had asked that question prior to that time and was told that it was none of his business.

The expired contract provides that the Respondent "shall pay the shop chairperson and steward for all time spent during working hours on Union business including the handling and investigation of grievances, as set out in this Agreement, for time spent on arbitration hearings and for negotiations."

Langston testified that the past practice of the parties under that provision of the contract had been that the union officials were paid for any and all union time for grievance handling, grievance investigation and writing, and arbitrations. When Langston was a unit employee, he notified the Respondent that he was going to be on Union time, such as having to leave work early to attend a Union meeting at a distant site, and he was paid for such time. Langston stated that such practice changed as a result of the December 19 letter.

Langston stated that prior to December 19, no explanation was requested as to what union business he was engaging in, and according to the contract, such time was not limited, and no explanation was required. Langston did not reply to the Respondent's letter inasmuch as the employees were on union time, and what they were doing on such time was none of the Respondent's business. Langston stated that the Union had a Christmas party in 2002 to which unit employees are invited, but he could not recall the date, or if he invited the Respondent's employees, or whether Reid or Teja were present. See,

however, testified that he believed that Reid and Teja were present, but was not certain of that fact.

Callahan stated that as far as he knew, there were no grievance hearings, arbitrations, negotiations or union-employer meetings scheduled for December 20, but he believed that the Union was having a Christmas party at its office on that day.

According to the Respondent, it did not, as set forth in the complaint, since December 20, 2002, reduce paid time for union business. It asserts that it had begun doing that on May 7, 2002. In a letter dated May 7, 2002, Callahan responded to the Union's advice that Brown's presence was required on May 6 for an arbitration hearing. Callahan wrote that inasmuch as the hearing ended at about 11:00 a.m. and Brown should have been at work at 12:30 p.m. the Respondent would not pay him for four hours, from 12:30 p.m. to 4:30 p.m. That policy was begun by Callahan at that time in May.

As set forth above, on December 19, 2002, the Union asked that Reid and Teja be excused on union business on December 20 from 11:00 a.m. for the rest of the day. The Respondent asked for the nature of the union business and for an explanation of why their presence was required for the period of time requested.

The parties' expired contract provided that paid union time activities included grievance investigation and handling, and time spent at arbitration hearings and negotiations. Although Langston testified that, in the past, the Respondent had not requested an explanation as to why union time was requested, however, apparently the Union did inform the Respondent on May 7, 2002 that Brown was needed for an arbitration hearing and would be on union time. In addition, Langston's testimony implied that when he requested union time, for example, he advised that he had to leave work early to attend a union meeting at a distant site.

In this case, Callahan was not aware that any of the contractually enumerated events, such as an arbitration hearing or a negotiation, required Reid's and Teja's presence away from the facility, and as such he reasonably asked the nature of their union business. I do not regard this as an intrusion into their union activities, but only a means to ensure that the contractual provision was observed. In this regard, this issue is similar to that in the past practice in *E. I. du Pont & Co.*, above, in which the past practice cited by the union conflicted with specific terms of the contract. Here, specific language in the contract specified what types of union business was contemplated in requiring the Respondent to pay employees for their time in such activities. Those activities included grievance handling and investigation and for their time at arbitration hearings and negotiations. The Union could not explain why Reid and Teja were needed, and the implication, based on See's testimony that he believed that they were present at a Union Christmas party that day supports Callahan's belief that they were so engaged.

In sum, I find that there was no change in the past practice of providing representatives with paid time off for union business, as defined in the contract, and that the Respondent has not violated its obligation to bargain in this regard.

V. THE IMPLEMENTATION OF A LOCKER AND LOCK POLICY

On July 3, 2003, the Respondent issued a memo to its employees which stated that "each maintenance employee will be assigned a locker and issued a combination lock." This refers to the lockers in the basement shop area.

Prior to the issuance of the memo, no lockers were assigned. If an employee wanted to use a locker he just selected one and put his belongings in it. If he wished to lock it, he used his own lock. It was Brown's practice to put his company-issued raingear, coat, overalls and equipment in the locker, but not lock it. The parties' contract provides that if a company issued item is lost or negligently destroyed, the employee shall replace it at his own expense. Brown conceded that it is a good idea to lock his locker since he is responsible for lost items.

After the memo was issued, Respondent's manager Segneri assigned a locker, and gave a combination lock to each employee. Brown stated that prior to the issuance of the memo, no one from the Respondent discussed this new locker and lock policy with him as shop chair, and no offer to bargain about it was made. Similarly, Brown did not know that the memo would be issued prior to the time that it was issued.

Segneri testified that employees were given equipment 10 years earlier but no longer had them. In order to hold employees responsible for the equipment they were issued, Segneri decided to assign lockers and give locks to each worker, in which they would keep their company-issued equipment. He stated that since the issuance of the policy, he has not disciplined anyone for not locking his locker.

As set forth above, on July 3, 2003, the Respondent implemented a new policy whereby it assigned a locker and lock to each employee. Prior to this memo, the employee used any locker and locked it if he wished. This policy was instituted for the purpose of holding employees responsible for the clothing and equipment they were issued, which under the contract they had to replace if lost or negligently destroyed.

Locker rooms and locker use is a mandatory subject of bargaining as to which the Respondent must bargain with the Union before implementing a new policy. *J. R. Simplot Co.*, 238 NLRB 374, 375 (1978). The Respondent asserts that the new policy was consistent with the contractual provisions, above, requiring it to supply certain equipment, and making employees responsible for lost items.

Although the new policy may be a reasonable outgrowth of the contractual provisions, it nevertheless is a new policy which required bargaining with the Union before its implementation. Contrary to the Respondent's assertion, the policy is a material change, requiring employees to put their gear in lockers and lock the locker, pursuant to which they would be held responsible for the loss of such property. Although they were held responsible before the implementation of the new rule, this new requirement represented a change, as to which the Respondent was required to bargain with the Union before its implementation.

I accordingly find and conclude that the implementation of the new locker and lock policy violated Section 8(a)(5) of the Act.

3. The Subcontracting of Unit Work

As set forth above, before a waiver of the duty to bargain will be found, there must be clear and unmistakable evidence of the parties' intent to waive this right. Such evidence is gleaned from an examination of all the surrounding circumstances, including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement. *Columbus Electric Co.*, 270 NLRB 686, 687 (1984).

The complaint alleges that on various dates in 2002 and 2003, the Respondent unilaterally subcontracted certain work that had previously been performed by unit employees, without giving the Union an opportunity to bargain with it concerning such subcontracting.

The contract's recognition clause also states that persons not in the unit shall not perform "work of the type customarily performed by" unit employees except in the following situations: (a) in emergencies when employees are not available (b) in the bona fide instruction or training of employees and (c) duties of an experimental nature or in the case of vendors or warranties, tryouts. The remedy for a violation of the above is that "the employee in the appropriate job description with the least amount of accumulated overtime hours will receive pay at the applicable rate for the hours of work performed."

Callahan testified that he generally asked the Union's steward or shop chair or lead person or even a unit employee to perform certain work. If that person said he could not do the job, or if the Respondent did not have the special equipment needed such as a powerful jet snake, he would subcontract the work.

Langston testified that in his 20 years of employment at the Respondent, and his service as shop chair, the practice regarding subcontracting of work was that if the employer believed that a subcontractor was needed, it advised the shop steward or the shop chair that it was considering having a subcontractor perform certain work. The Respondent would be questioned as to which subcontractor would be doing the work, the type of work to be performed, and the length of time estimated for the work. The unit employees would then be given the opportunity to perform the work, and if it was beyond the scope of their ability, such as welding, the removal of large trees, or snaking plumbing lines containing large amounts of roots or grease requiring a long snake or a powerful jet snake, the Union would decline the work. Otocka, who had also been employed for 20 years, and Brown, gave testimony consistent with the above. Langston conceded, however, that the expired contract does not contain any language requiring that this discussion process occur before the Respondent subcontracts work. However, he also stated that he was not aware of any instances over the years where the Respondent routinely subcontracted work without discussing the matter with the Union. Nevertheless, he agreed that the annual cleaning of the rain gutters is subcontracted without the Respondent discussing the need for subcontracting with the Union. In this regard, however, Langston stated that gutter cleaning was once a part of the employees' work, but had previously been "bargained away" by the Union.[8] In this connection, Langston stated that if subcontracted work is not part of a unit employee's job, there is no need for a discussion with the Union.

Specifically, Langston stated that prior to the arrival of WC&F, when he became aware that a subcontractor was erecting a large fence around the perimeter of the property, he protested that the Respondent did not notify the Union about such work. He met with the property manager at the time and the work was given to the unit employees, with payment being made for the amount of time the contractor performed such work. Otocka testified to a similar event with an antennae removal project which was begun by a subcontractor but finished by unit employees after a grievance was filed.

Callahan also testified to an ongoing window project in which every window at the complex was being replaced over a five to six year period. Although this was carpenters' work, a contractor did that job without any objection by the Union.

Heil's pre-trial affidavit stated that he could not understand, sometimes, why Callahan wanted to pay outside contractors for jobs the Union employees could have done. However, he testified that the only plumbing work that was subcontracted was work which the employees were unable to handle because they did not have the proper equipment for the job, for example, snaking a main sewer line going into the street.

Heil stated that in 2002, Callahan told him to call outside contractors such as Mr. Rooter for many routine plumbing jobs, but which the employees could not handle, and were not completely qualified for, such as sewer work. His affidavit further stated that he was told by Callahan to call American Boiler and Santa Fuel "just about any time we had boiler work to be done" and was also told by Callahan that he did not want the "Union guys" in the boiler room.

a. The Allegedly Unilaterally Subcontracted Work

The complaint alleges that certain specific work was unilaterally subcontracted. In *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that the decision to subcontract work which resulted in the replacement of unit employees with those of a contractor to do the same work is a mandatory subject for bargaining, and that such duty includes the duty to advise a union in advance of making a decision to subcontract. As set forth above, the contract includes a provision which states that the past practice regarding subcontracting shall continue. See *Allison Corp.*, 330 NLRB 1363, 1365 (2000). The work allegedly unlawfully subcontracted will be discussed here.

i. June 17, 2002

It is alleged that on June 17, 2002, the Respondent subcontracted boiler work, including preparing boilers for tube replacement and closing boilers.

On June 17, 2002, employees of American Boiler, Inc. (American) opened the boiler doors in preparation for boiler tube repairs. The boiler doors must be opened so that the tubes may be repaired. Langston and boiler tender Netsel stated that in the past, the Respondent's employees opened and closed the boiler doors.

Langston stated that American Boiler has routinely performed subcontracted work in the boiler room, such as chang-

[8] Otocka stated that the unit position of "roofer" had been eliminated.

ing boiler tubes and welding work. Langston notified American regarding the need for it to perform such work. It is clear that changing tubes was not work that unit employees could perform. Callahan stated that American Boiler has opened the boilers in the past.

James McCarthy, the manager of American, stated that it has performed work for the Respondent for 20 years, including welding, and repairing leaks on the boiler and in piping. He also stated that American would dispatch a mechanic in response to a call from Langston or his employer of a leak, adding that Langston contacted him many times when boiler room work needed to be done, most of which was tube replacement or underground steam lines in the building. He stated that at times American opened and closed the boiler doors in connection with its work in the boiler. He stated that upon American's arrival, if the boiler doors were closed, its mechanics would open them, often with the help of Respondent's boilermen. On occasion, those employees refused to help open the doors. With respect to the June 17 work, McCarthy did not know whether American opened the boilers, and Callahan testified that he believed that boiler tender Netsel was not at work.

The evidence establishes that, historically, the work of opening and closing the boilers prior to work being performed on the boilers, has been performed by the unit employees. However, American has, in the past, performed such work as incidental to its work on the boilers. On such occasions, when the Respondent's employees were not available to perform such work, or if the doors had not been opened, American would open and then, after completing its work, close them. Based on these facts, I cannot find that the General Counsel has proven that the Respondent unlawfully subcontracted unit work on June 17. There was no evidence that unit employees were available to perform that work, or that they were denied an opportunity to do such work. I will accordingly recommend that this allegation be dismissed.

ii. June 21, 2002

It is alleged that on June 21, the Respondent subcontracted boiler work, including the replacement of hot water circulators and sump pump.

On June 21, American replaced two hot water circulators and one sump pump in the boiler room. Langston testified that such work was unit work which he had performed many times in the past. He stated that replacing the circulators, which involve disconnecting the wiring, is "standard boiler tender's work" not requiring an electrician's license. He added that during his employment at the Respondent, it had not historically subcontracted such work. Netsel testified that he has, in the past, replaced hot water circulators and sump pumps. In fact, Netsel stated that he was specifically asked by Callahan to obtain a new sump pump, and he installed it. Netsel testified that the circulators were broken for one month before they were replaced. Brown stated that he replaced hot water circulators and sump pumps.

Callahan stated that American has replaced hot water circulators before, and that such work requires electrical work, disconnecting the old wiring and connecting it to the new circulator, adding that the Respondent has no electrician on its payroll who is qualified to work with wiring. He further stated that American replaced the sump pump on an emergency basis, and to his knowledge it has replaced sump pumps before.

McCarthy stated that American has replaced circulators at the Respondent's premises prior to June 21. Although some electrical work was involved in the June 21 work, he did not deliberately assign the company's licensed electrician to replace the circulator. American was called by the Respondent on June 21because of a three-foot flood in the boiler room, which was due to the broken sump pump. Apparently, Netsel, the sole boiler tender at the time, was not at work that day. McCarthy could not recall if American replaced sump pumps at the Respondent's premises in the past. McCarthy stated that he believed that employee Tapanes was capable of changing a sump pump.

The collective-bargaining agreement permits non-unit personnel to perform unit work in the event of "emergencies when employees are not available." This appears to be one of those cases. I accordingly cannot find that the Respondent has acted unlawfully in subcontracting the replacement of hot water circulators and sump pump on June 21 which due to their breakage caused a flood in the basement in the absence of unit employees. I will accordingly recommend that this allegation be dismissed.

iii. June 24, 2002

It is alleged that on June 24, the Respondent subcontracted the work of replacing an outside faucet. On that date, American replaced an outside faucet which was causing a flood. Langston stated that such work was routinely done by the Respondent's plumber. Employee Kelly stated that in order to obtain access to the faucet the employee must enter the crawl space containing asbestos, to shut the water. At the time of this work, the employees had not been certified to work in areas contaminated by asbestos and, in fact, had been prohibited from entering the crawl spaces and basements since July, 2001. At that time, the board of directors sent a notice to all employees that they were not to enter the cellars, until further notice, to do plumbing work. Prior to that time, in March, 2001, the employees were told that if they saw any friable asbestos in the crawl spaces they must leave the area immediately and report it to the leadman. Brown conceded that it was in the best interest of the workers' health that they not enter those areas.

McCarthy stated that American had not performed that type of work prior to June 24.

Callahan stated that at that time, American Boiler was at the facility performing other work, and he asked that company to fix the faucet since the unit employees could not enter the crawl spaces.

I will recommend the dismissal of this allegation. First, the work was done pursuant to an emergency, a flood caused by the defective faucet. Unit employees were not available since they were prohibited from entering the crawl space to shut the water before replacing the faucet. Under these circumstances, the Respondent did not violate the Act by subcontracting this particular repair work.

iv. July 5, 2002

It is alleged that on July 5, the Respondent subcontracted a plumbing repair. On that date, a subcontractor was asked to complete a plumbing repair which Lloyd Reid began but was not able to complete. In the grievance form, the Union stated that Reid, a carpenter, was not qualified to make the repair. Reid testified that he was assigned to snake a bathroom sink. He took the sink trap apart and snaked the sink, but could not reassemble the trap. He told Heil that he could not complete the job, and Heil said that he would call Mr. Rooter, a subcontractor. Reid stated that Heil did not check with any other unit employee, although Brown was working that day, before saying that he would call a subcontractor. However, Reid noted that he did not suggest to Heil that Brown or anyone else in the unit could have finished the job. Tapanes was not at work that day. Reid stated that prior to the arrival of WC&F, if he was asked to perform a particular job which was beyond his skill level, he believed he told his supervisor to ask another employee, and if he could not do the work, to check with the Union.

Brown stated that when he and Roscrans were laid off, no plumbers were employed, so the Respondent assigned Tapanes to be the plumber, and Reid, who was inexperienced, as his helper. Brown filed the grievance regarding the July 5 work because he was available, and could have completed the job. Callahan stated that subcontracting is routinely done where he is told by the unit employee that he was not able to complete the repair.

This appears to be an instance in which another unit employee, specifically Brown, could have performed the work. Brown had experience in plumbing work. The Union's witnesses convincingly testified, which testimony is consistent with Callahan's testimony regarding the subcontracting of door installation work, that if a unit employee was unable to perform certain work, or if the Respondent was considering subcontracting a job, the Union would be consulted and other unit employees were asked if they could do the work. Only when no unit employee could perform the work, was the job subcontracted.

I accordingly find that inasmuch as Brown was available to perform this unit work, the subcontracting of such work was unlawful.

v. July 17, 2002

It is alleged that on July 17, the Respondent subcontracted the replacement of check valves.On that date, three employees of American replaced eight check valves, taking eight hours to complete that job. Langston stated that that was routine plumbing work done by the Respondent's employees in the past. Brown stated that he and Tapanes performed such work in the past. This work took place in the crawl space and was subcontracted because unit employees had been prohibited from entering those areas due to the presence of asbestos. McCarthy testified that such work was performed in the crawl space, adding that American had replaced check valves at the Respondent's premises about eight to ten years before this instance.

I cannot find that the Respondent violated the Act with respect to this instance of subcontracting. The work required to be performed was located in the crawl space containing asbestos at a time when the unit employees were not trained in performing work in asbestos contaminated areas. I will accordingly recommend that this allegation be dismissed.

vi. October, 2002 through November, 2002

It is alleged that from October, 2002 through November, 2002, the Respondent unilaterally subcontracted boiler work, including starting and checking the boiler, repairing an oil lead, and cleaning and servicing the burners and cleaning the boilers. Invoices received in evidence from American Boiler and Santa Energy Services (Santa), establish that such work, with the exception of repairing an oil lead, was done during that time period. Langston testified that unit employees perform all such work, including repairing oil leads. Similarly, Netsel testified that he has in the past performed the following work which was done by American: handhole and manhole gaskets, close the boiler, start and check the boiler, clean and service the burners, replace a flex line, and clean the burner nozzles. He also stated that he installed new leader leads and new pump leads.

Callahan testified that on October 15, at the start of the heating season, there was a problem with one of the boilers when the boilers were turned on. He conceded that Netsel cleans the boilers and opens and closes them, but stated that at that time, Netsel was out of work for six weeks due to an injury, and no one employed in the boiler room was available to perform this work or other routine work. Netsel conceded that in October, 2002, when he was out of work, there was no employee in the boiler room to get the boilers started for the heating season. He further stated that as to the work done by Santa in October and November, such work was performed by that company in the past. Callahan noted that the state of Connecticut requires that persons performing work on a burner be licensed. However, no evidence was produced to prove that alleged requirement, and no employee of Respondent possesses such a license. Netsel, who is the Respondent's sole boiler tender, testified that no license is needed to work on the Respondent's low-pressure boilers. The basis for Callahan's knowledge of this alleged requirement is his awareness that American and Santa are licensed to do the work. Santa's manager, Thomas Fahy, testified that a technician employed by a heating contractor such as Santa must be licensed. That only establishes that a heating contractor's employees must be licensed, not employees of the Respondent.

Regarding the specific work done by the contractors and alleged here as unlawful subcontracting, Callahan agreed that checking the boiler, and cleaning nozzles and strainers are work done by unit employees.

McCarthy testified that American cleaned the boiler because Netsel was out of work due to an injury, and that cleaning the boiler was not part of American's usual duties at the Respondent.

Santa manager Fahy testified that the state of Connecticut requires that Santa's employees be licensed to work on burners. It has responded to emergency, "no-heat" calls from the Respondent, and it has also done routine work on an as-called basis to fill in for the Respondent's employees. Regarding the specific instances of the alleged subcontracting, Fahy testified that with respect to the period between October 31 and November 13, 2002, Santa had performed such work in the past, in

2001 and 2002, and it had also done similar, although not identical routine maintenance, cleaning and other service work prior to that time, between February, 2001 and May, 2002. Fahy stated that he knows that the Respondent's employees perform the routine cleaning of burners and nozzles as part of their regular duties. However, Santa performs such work pursuant to a request by the Respondent, when the Respondent's employees are unavailable. He believed that in October and November, 2002, when Santa performed such work, Netsel was out of work due to an injury.

The General Counsel argues that, notwithstanding that Netsel was out of work during the time that the above work was subcontracted, the Respondent should have asked the Union if other employees could perform such work before subcontracting it. One such person who could have done such work was Brown, who the Respondent had laid off for lack of work on October 11, 2002.

Inasmuch as I find that Brown was unlawfully laid off on October 11, 2002, it must be determined whether he could have performed the above work on the boilers which was the unit employees' usual work. Brown had five or six years experience as a boiler tender with the Respondent. The Respondent relies on Brown's alleged statement one year earlier that he was unqualified to work on the boilers. Regardless of whether Brown said that he was unqualified to perform such work, had he not been unlawfully laid off in October, 2002, he would still have been employed by the Respondent at the time this work was subcontracted. Clearly, he could have been assigned to perform such work at that time. I accordingly find that the Respondent unlawfully subcontracted such work.

vii. October 4, 2002

It is alleged that on October 4, 2002, the Respondent subcontracted the replacement of light bulbs and light repair. A grievance set forth that on October 4, the Respondent employed a contractor to perform electrical work in the basement. The work done included checking the basement lights, replacing light bulbs, fixing a socket, and repairing wiring on a wall switch. Brown conceded that those last two jobs were electricians' work, although the unit employees fixed sockets. DeSousa testified that he saw the electrical contractor changing light bulbs in the basement, and that the worker said that Heil called him regarding those lights. The Respondent employs no electrician, but as testified by Langston, the unit employees performed certain electrical work such as maintaining electrical components such as floor lights, changing starters in sodium lights, changing timers, wiring a photoelectric cell in a timer, changing light fixtures and bulbs, and changing outlets in apartments. Nevertheless, unit employees could not perform such work as changing the direction of electric flow, or replacing equipment with a different type of equipment. However, unit employees could change equipment that was already in place.

Brown testified that the contractor replaced a light bulb. He asked Heil why he hired a subcontractor to change a bulb. Heil replied that he gave the work order to DeSousa who claimed that he could not do the job. Brown accused Heil of lying, adding that DeSousa said that he never saw the work order and was not offered the job. DeSousa corroborated that testimony. Brown conceded that the electrician might have been called to perform other work, and was given the bulb-changing assignment since he was already at the premises. DeSousa testified that he does such electrical work as replacing switches, plugs, and changing light bulbs and light fixtures. The Respondent did not offer to bargain with the Union regarding changing the bulbs.

Callahan stated that the electrician was called in to fix or replace a socket, work which has been historically subcontracted. While he was on the premises he was asked to change a light bulb. Callahan had no knowledge of whether employees change wall sockets in apartments, but conceded that they make simple changes of light fixtures.

It is clear that changing light bulbs is unit work. The mere fact that the electrician was present to wire a light socket, which has been historically subcontracted, does not mean that he could also perform unit work, such as replacing a light bulb. I accordingly find that the Respondent unlawfully unilaterally subcontracted the work of replacing light bulbs

viii. July 15, 2003

It is alleged that on July 3, 2003, the Respondent subcontracted the work of constructing concrete slabs. Brown testified that during the summer and fall of 2003, he saw an outside contractor installing two concrete slabs on which the garbage dumpster sits. The contractor's employees were digging out an area to accommodate the dumpster, framing it, and pouring two slabs of concrete. Brown claimed that such work was unit work since the Respondent's employees do the same type of work, the only difference being that the concrete slab had a different size and was larger than the in-walks the workers installed. Brown further stated that the Respondent did not inform him as shop chair that the contractor would be performing this work.

Brown conceded that concrete for sidewalks and roadways at the Respondent's premises has been poured by subcontractors, and that an asphalt sidewalk was installed next to this dumpster. Installation of the sidewalk adjacent to the dumpster had historically been the work of subcontractors. Although Brown did not know what equipment the contractor used to dig out the area where the concrete pad was laid, he conceded that the Respondent does not have a backhoe, and that work involving backhoes has been historically subcontracted out.

Segneri testified that the decision to subcontract the work of installing the concrete pad was made before the Respondent employed him. He noted the differences between that work and the installation of in-walks. Whereas the in-walks require three to four inches of 3,000 pound pressure mix rated concrete placed on a gravel base, the dumpster pad was six to eight inches thick, requiring a 4,000 to 5,000 pound pressure mix reinforced with steel. In addition, the dumpster area must be excavated to one foot which cannot be done with any equipment owned by the Respondent. Further, asphalt had to be applied where the sidewalk met the concrete, and the Respondent does not do asphalt work of that magnitude.

I find that the work done here differs in material kind from that which the unit employees performed. It involved excavation work with equipment not owned by the Respondent, and

which the employees do not historically perform, and the use of concrete of a different grade than usually utilized by unit employees. In addition, the installation of the sidewalk adjacent to the dumpster had traditionally been subcontracted. I accordingly find no violation in the Respondent's subcontracting of this particular work.

D. The Alleged Discrimination Against Employees

1. Animus Toward the Union

Certain board members met with attorney Zaken on July 12, 2001 prior to his being retained. A memo entitled "project rope-a-dope" was prepared thereafter which stated that the purpose of the meeting was "to obtain information regarding the ousting of Success Village Union employees." The memo further stated that Callahan met with the board and "stated the need of his organization due to all the union problems we are encountering." Callahan stated that "with the proper personnel at the helm, Success Village will be running smoothly within a short time." A confidential memorandum concerning legal advice given to the board was prepared. The Respondent objected to that memo and its offer in evidence was rejected as being subject to the attorney client privilege.[9]

June Prescott, a member of the Respondent's board of directors, testified that it was never the board's plan to oust the Union from Success Village. She stated that the term "ousting" in the memo related to the board's belief that upon the expiration of the contract on May 31, 2002, the Union would no longer be the employees' representative, and that the Union would be "through" and "ousted" as of that date, and that then the Respondent "had nothing more to worry about." She referred to the confidential memo as being not "for everyone's eyes. In other words, this was our problem until we solved it." Board member Barbara Ignatiuk stated that she believed that upon the contract's expiration the Respondent could fire the employees and hire others. However, at the meeting with Zaken on July 12, the Board was informed that it had to bargain in good faith with the Union even though the contract bore an expiration date.

As set forth above, on October 19, 2001, as set forth in the credited testimony of See and Otocka, Marcinczyk told See that "as long as I'm president, for as long as I'm president I'm going to get rid of this union." Otocka testified that he heard board president Marcinczyk say essentially that "he was going to do everything he could in his two year term of office there to get rid of Russ [See] and the UAW." I do not credit Marcinczyk's testimony that he merely told See that he would beat him at his own game. Even assuming he said that, such a comment tends to support a finding that Marcinczyk sought to eliminate the Union from the Respondent's premises.

Board member Willie Lawrence signed a memo in July, 2002 which stated, inter alia, that the board based many of its decisions "on how to discourage the employees and how to get rid of the union" based on suggestions made by board members Tortorello and Bica. Lawrence wrote that Tortorello "hated" the idea that Brown was allowed to attend Union meetings on company time. "He felt that we shouldn't allow it no matter what the contract said." Lawrence testified that he could not say that the Board "exactly discussed getting rid of the union per se, what we was trying to do is trying to get more work out of the employees and just trying to figure out a way to do that. I don't remember discussing any other thing." He had no recollection of any matter in the memo aside from what was written there. He first stated that he did not know that Langston was a union agent. He believed that clerk Ceil Johnson wrote his statement, and then he signed it. He further stated that he did not read it when he signed it. He also said that he hand-wrote the statement and Johnson typed it. Then he said that Johnson hand-wrote it and then typed it. He also stated inconsistently that he was a board member, and was not a board member when he signed it. In fact, he was not on the board when he signed it, and then said he was not certain if he was on the board at that time. He noted that he has urged the board to hire more employees to get the work done.

Board member Judith Cannizzio stated that Marcinczyk discussed "getting rid of the Union" at a number of board meetings, adding that he said that the "cost to keep them there was too much and that they wanted to more or less get rid of them and go to seasonal work or whatever and outside help, outside contracting . . . instead of union employees."

She stated that "rope-a-dope" was a "code word" so that the Union members would not know what they were talking about. Cannizzio also stated that Marcinczyk said that he wanted to get rid of Brown and make him a seasonal employee "because he was a shop person and because they wanted to get rid of who they could that was union." The other board members agreed with this plan.

Cannizzio stated that prior to the summer of 2001, the relationship between the Union and the Respondent was good, with the employees working well and few grievances being filed. She conceded hearing some complaints, which were not "drastic" complaints, that the employees were not performing their work. She also noted that in the Fall of 2001, residents complained that more workers were needed.

Cannizzio is a union member at her job, and has been a friend of See for more than 15 years. She showed him copies of board minutes and spoke with him about topics discussed at board meetings. She claimed that the discharges of Kelly and Agnant were because they were Union members, and also stated that the Respondent sought to eliminate Union employees in the boiler room so they could automate some of their duties.

Callahan testified that Marcinczyk's meaning of the term "rope-a-dope" in the July memo signified the course of events if the Respondent attempted to make its operation more efficient: the Union would file grievances causing the Respondent to pay large legal fees, and then the Respondent would "give in." Board member Ignatiuk gave similar testimony. Marcinczyk testified that the term was a reference to a prizefight in which one boxer became exhausted in punching the other who leaned against the ropes. He applied it to the current situation, in which the Respondent expected to get a "deluge" of grievances, but that the Respondent would absorb them and then

[9] My Order rejecting that exhibit was received in evidence as GC Exhibit 51.

"win the fight legally." He denied that it was a plan to get rid of the Union.

Brown testified that when he was out of work due to an injury in August, 2002, he and DeSousa were scheduled to meet with an NLRB agent. The agent canceled the meeting, and Brown went to the shop where he told Heil that DeSousa would not have to meet with the Board agent since the meeting was cancelled. At that time, Callahan entered the room, and said "oh, this damn union is in here again. I got a business to run here. I can't be fooling around with this union." Brown conceded that his pre-trial affidavit did not include this exact exchange, but it did state that Callahan said something about the union being "in here again," and that "he had a place to run and this union kept coming in."

Heil's pre-trial affidavit stated that board members Marcinczyk and Tortorello complained often about Brown's grievance activities. Heil's affidavit also stated that he believed that Callahan or some of the other board members "had it in for Brown" because he filed many grievances and utilized "Union time" on the Respondent's time.

Heil testified that he believed that Callahan "had it in" for all the Respondent's employees, and he also believed that Callahan is attempting to "get rid" of the Union. Heil's credibility is subject to question. He first testified that he came to the hearing alone, in his own car, and that he followed Callahan and Zaken. Then he testified that he came to the hearing in the same car as Zaken and Callahan, and then stated that Callahan followed them in his own car. He admitted that he gave false testimony that he drove alone because he believed that it "was not the right thing to say" because it may have been a "conflict of interest" for him to have traveled to the hearing with the Respondent's attorney and principal. It should be noted that at the time of the hearing, Heil was no longer employed by the Respondent. He further testified that, on substantive matters, his testimony was inconsistent with his pre-trial affidavit. Nevertheless, he stated that other than his testimony concerning his trip to the hearing, the rest of his testimony was truthful. As noted below, I credit Heil's testimony concerning the Respondent's attitude toward the Union. Heil was the on-site, full-time manager of the WC&F who enjoyed the confidence of Callahan. The fact that he lied about how he came to the hearing does not detract from his testimony in chief as to the matters about which this hearing was concerned.

The above synopsis of the evidence concerning the Respondent's attitude toward the Union and toward its employees who were represented by the Union has a common thread. There was a dislike of the Union because of its aggressive stance regarding grievances. If the Respondent sought to oppose a grievance it had to incur legal fees and increased costs. The board believed that it was powerless to oppose the Union, and therefore resented it and its members. In retaining Callahan and Zaken, the Respondent sought to "oust" the Union, and if it could not do so, it would attempt to change its relationship with the Union. Callahan testified repeatedly that he was hired upon a promise to change the relationship between the Respondent and the Union, and to change the operation in order to make it more efficient. He sought to make these changes immediately upon his hire, and, as testified repeatedly by Callahan, affected the employees directly.

I credit Heil's testimony concerning the Respondent's attitude toward the Union. Such testimony was consistent with that of board member Prescott who believed that the board wanted to "oust" the Union, and board president Marcinczyk's statement that as president, he would do everything he could to get rid of the Union, and Lawrence's testimony that the board wanted to get rid of the Union. Although the testimony of Heil and Lawrence were at times confused and inconsistent, their essence, that the Respondent sought to rid itself of the Union was consistent and credible.

2. Dennis Brown

The complaint alleges that the Respondent unlawfully (a) laid off Dennis Brown on December 7, 2001(b) imposed more onerous working conditions on him since May 1, 2002 when he returned from layoff (c) issued written discipline to him on July 3 and 12, and August 5, 2002 (d) reduced his sick leave accrual on August 30, 2002 and (e) laid him off on October 11, 2002.[10]

Brown was employed by the Respondent for about nine years. For the first five or six years he worked as a boiler tender. He then requested a transfer because he no longer wanted to work during holidays and weekends which is required of a boiler tender. He then worked as a plumber and carpenter. He had prior experience as a plumber before beginning work with the Respondent. As a carpenter, he replaced broken windows, did sheetrock repairs, renovated bathroom floors, changed light bulbs and light fixtures, and worked outside on the garbage truck if needed. He also did plumbing work when employed as a carpenter if Giannattassio or Reinaldo Tapanes, who regularly did the plumbing work, were not at work.

Brown became shop steward in September, 2001, and when Otocka left his employ in about November, he became shop chair and held that position until his lay off on December 7. Upon his return to work on May 1, 2002, he resumed his position as shop chair until his layoff on October 12. Brown was an active and vocal Union representative. He attended meetings with management regarding grievances over the reduction of hours of Giannattassio and the termination of Agnant and Teja. During the time that he served in these positions he wrote at least 70 to 80 grievances.

a. The Lay Off of December 7, 2001

On December 3, 2001, the Respondent notified Brown that it was "going to seasonally" lay him off, effective December 7.[11] Brown immediately wrote back, asking to "invoke my right to bump the lowest seniority man, which would be I-B boiler man position effective immediately." The only employee in the boiler room at that time was Netsel, and Brown had greater seniority than Netsel. Brown was not permitted to exercise any bumping rights he may have possessed. Callahan replied two months later, on February 8, 2002, that Brown was laid off because he was the least senior employee "in the carpenter and

[10] Brown was actually laid off by letter dated October 12, effective on October 18. That date will be used hereafter.

[11] Russell Roscrans was also seasonally laid off at that time, but his layoff has not been alleged here as an unfair labor practice.

general maintenance areas" and there were no positions to which he could bump. Nevertheless, Callahan testified that the basis for his refusal to permit Brown to bump into the boiler room was Brown's alleged statement in October that he was not qualified to work in the boiler room.

In that connection, Callahan testified that he was present at a meeting on October 18, 2001 with Brown, Otocka and supervisor Elliot in which Callahan requested help in the boiler room since only one employee, Netsel, was working there following Teja's discharge the day before. Specifically, the managers wanted Brown to work in the boiler room. As testified by Callahan and confirmed in a letter written by Elliott to Otocka the next day, Brown was quoted as saying at the meeting that he was uncomfortable and "unqualified" to work in the boiler room. No reply to that letter was sent and the letter's claim that Brown said that he was unqualified to work in the boiler room went unchallenged.

Brown denied being at the meeting, and also denied telling Otocka that he was not qualified to work in the boiler room, although conceding telling him that he did not "really" want to work there since he was "comfortable" in his current position, which had favorable hours. Otocka denied telling Elliott that Brown was unqualified to work in the boiler room.

Brown stated that although he did not want to return to the boiler room in October, 2001, he was willing to bump into that position upon his layoff in December because his job was "at stake."

It should be noted that although Callahan knew that Brown had "qualms" about returning to the boiler room, he did not tell him on October 18 that he intended to lay him off, and did not tell him in November that he was in danger of losing his job due to a layoff. Further, in December, Callahan did not advise the Union that it was about to lay off Brown, and he did not give Brown an opportunity to reconsider his lack of interest in working in the boiler room. Callahan stated that the basis for not permitting Brown to bump into the boiler room was Elliot's letter of October 19 to Otocka confirming that Brown said that he was unqualified to work in the boiler room.

The contract provides that layoffs shall be made on the basis of seniority, provided that the senior employee is qualified and able to perform the work available. Upon a layoff, bumping to another position is permitted. The contract states that "in the event that the Co-op feels that an employee is not qualified and able to perform the available work, the employee may request, and the Co-op will grant him/her five days in which to demonstrate to the Co-op his/her qualifications and ability to perform the required work." Langston believes that that clause would have permitted Brown to prove that he was qualified to perform work in the boiler room upon bumping into Netsel's position.

Nevertheless, Callahan noted that although the Respondent believed that Brown was qualified to work in the boiler room and that is why it asked him to do so in October, 2001, he said that he was not qualified at that time. Accordingly, two months later, in December, when Brown requested bumping rights, the Respondent rejected that right, relying on Brown's previous statement that he was unqualified for that position. Callahan said that the contract's provision that Brown would have five days to prove his qualifications was irrelevant as Brown had already informed it that he was not qualified for the boiler room.

i. Reasons for the Layoff

Brown stated that when he was laid off, he was doing carpentry work, helping Roscrans with plumbing assignments, helping on the garbage truck and any other work which needed to be done. He testified that he noticed no decrease in the amount of work he did in the time leading up to his layoff. In fact, in the past, there had always been an abundant amount of work in the winter for carpenters, which in addition to their regular work included leaf and snow removal.

Langston testified that in the Fall of 2001 and the Spring of 2002, due to the enormous size of the co-op complex, he was not aware of a significant reduction in the number of work orders, adding that there was never a time that work declines. He noted that in the winter, when the in-walks cannot be repaired, the carpenters worked inside—painting, changing ceilings, doing plumbing work and removing leaves and snow. Langston also testified that Brown was qualified to do plumbing work, and that such work increases by 50% in the winter with the onset of the heating season because the plumbers have their regular plumbing work to do in addition to heating-related problems. Langston, Otocka and Brown testified that prior to that time they had never heard the term "seasonal layoff", and no one had been seasonally laid off."

Otocka testified that Brown was a carpenter, doing floor, door and ceiling replacements, ceiling repairs, and drywall repairs. He is also familiar with plumbing work. He stated that there was never a time when the carpenters had no work to do, noting that there were only two or three carpenters to service 924 apartments.

Reid testified that there was ample plumbing and carpentry work in December, 2001 when Brown was laid off. He stated that following Brown's layoff, he worked with the plumber in addition to performing carpentry work. When plumber Giannattassio went on sick leave in November or December, 2001, Reid was asked to carry a beeper for plumbing emergencies. He also stated that during the winter months, the carpenters do mostly inside work, such as repairing ceilings and walls.

Subcontractor Mr. Rooter Plumbing performed various work during the time of Brown's layoff, from January, 2002 through April, 2002. Invoices for such work were received in evidence for the purpose of rebutting the Respondent's argument that Brown was laid off for lack of work in December, 2001, and to show that there was sufficient work available so that his employment could have continued. The work done by Mr. Roofer was the following: On January 11, 2002, a main sewer line was snaked; on January 12 and April 10, a toilet line was snaked and the toilet was removed. Brown testified that he had performed similar work at the Respondent's premises in the past and was capable of doing this work. [12]

[12] Other work done by Mr. Rooter during that time involved work in crawl spaces or basements in which employees were prohibited from working due to the presence of asbestos. That such work was performed in those areas is indicated on the invoice or description of work, or in testimony that an additional charge for labor was added for such

Callahan testified that Brown and Roscrans did "catchall" work consisting of plumbing and carpentry, "all kinds of different kinds of things, leaves, grass . . . some carpentry work, some miscellaneous work, little bit of plumbing work, little bit of everything," and that they had "so many work orders," but took longer than they should have to complete them. He stated that Brown was laid off because he was the least senior employee, and that the Respondent did not need two employees, Brown and Roscrans.

Callahan stated that prior to laying off Brown, he undertook a review, from the beginning of his tenure in August to December 7, in which he examined the number of work orders for the various months, and the types of jobs performed, and found that the work orders were "basically consistent", meaning that they were at the same level, and based on that decided that the Respondent did not need two employees. At that time, Kelly and Giannattassio were out of work due to injuries.

Callahan testified that he made the decision to lay off Brown and Roscrans between October 18 and December 3. He did not discuss his decision with the Union. He called it a seasonal layoff because he wanted it understood that Brown would be returning to work in early May for the outdoor maintenance season, adding that there would be more work at that time in different areas such as grass cutting and leaf removal. Such additional work, combined with employees taking vacations during that period of time, justified Brown's recall. Callahan disputed Langston's contention that there was more interior work in the winter, saying that such work was not the subject of work orders. Rather, that work was discretionary, for example someone deciding that the hallways should be painted. He decided that such work was not necessary to be done then. Callahan conceded that there is slightly more work during the heating season, with radiator and other plumbing problems becoming more frequent.

Callahan was aware that Brown was the shop chair at the time of his layoff, but stated that had no impact on his decision to lay him off. Roscrans, who did not hold a position in the Union, was also laid off at that time. They were both offered recall on May 1, 2002, but Roscrans declined the offer. No one was hired at that time to replace Roscrans. Callahan noted that during Brown's layoff, the Respondent had no difficulty in completing work assignments.

When asked the reason for Brown's layoff, Callahan testified that "people were working in an inefficient manner," and that he determined to do the same amount of work orders with less employees.

Board member Cannizzio flatly stated that the board authorized Brown's layoff in the fall of 2002 because he was the union shop chairperson.

Marcinczyk testified that Brown and Roscrans were laid off because the board believed that there was not enough grounds work to do, and they were selected since they were the least senior employees. Although Netsel was lower in seniority he was not selected because he was working in the boiler room.

work. That work will not be discussed herein since Brown was not permitted to work in those areas because of the presence of asbestos.

ii. The Arbitration

The Union grieved the layoffs of Brown and Roscrans, and was ultimately successful. The arbitration panel held that although the Respondent had the right to lay off employees for lack of work or for other reasons, nevertheless, the contract contains no language explicitly authorizing it to engage in seasonal layoffs, nor does it refer to seasonal employees, and a seasonal layoff was therefore apparently never contemplated by the parties.

The panel decided that in view of the absence of such language, the management-rights clause "is inherently ambiguous," thereby permitting the panel, using principles of parol evidence and contract construction, to find that the clause did not permit the Respondent to engage in seasonal layoffs. The panel based this conclusion on the facts that the contract does not provide for such layoffs or even seasonal positions, and that prior enforcement of the contract, its negotiation and prior management uses of the layoff provisions were silent as to seasonal layoffs. The panel concluded that the management-rights clause "abridges the Co-op's exclusive and unfettered right to establish seasonal positions unilaterally or to engage in seasonal layoffs in like fashion." The panel ordered that Brown be made whole.[13]

The award noted that the Respondent stated that "the Union did not present evidence of, or allege, that the Employer's actions were prompted by "improper motives or unjustifiable reasons." The Union's brief to the arbitrator, however, stated that it believed that the Respondent laid Brown off "in retaliation … because of his involvement with the Union. This course of events has further demonstrated the companies [sic] desire to eliminate the union and discourage the workers."

iii. Analysis

(a) The Section 10(b) Defense

The Respondent argues that the charge alleging Brown's layoff was untimely filed pursuant to Section 10(b) of the Act.

On December 5, 2001, the Union filed a charge in Case No. 34–CA–9945 which alleged that the Respondent violated Section 8(a)(5) of the Act by failing to bargain in good faith by "laying off employees and calling them seasonal workers, when the contract has no provision for seasonal workers. It is just another way of undermining the Union." This charge was dismissed, and the Union's appeal was denied.

On April 4, 2002, within the six month period following Brown's December, 2001 layoff, the Union filed a charge in Case No. 34–CA–10072 alleging essentially that since April, 2001, the Employer engaged in a course of action designed to undermine the Union and discourage employees from joining and supporting the Union by eliminating bargaining unit jobs, changing the hours of employees, and otherwise changing the terms and conditions of employment of employees in violation of Section 8(a)(3) of the Act. The charge did not mention Brown.

On December 20, 2002, the charge was amended to specifically allege that Brown was laid off in December, 2001 in vio-

[13] Roscrans' grievance was also upheld.

lation of Section 8(a)(3) of the Act. On February 28, 2003, the charge was dismissed. During the pendency of the Union's appeal of the dismissal, on April 30, 2003, the Regional Office reconsidered the matters raised in the appeal, and decided that Brown's December, 2001 layoff violated Section 8(a)(3) of the Act. The Director revoked the dismissal of that allegation, and issued a complaint as to it.

Standing alone, the specific 8(a)(3) allegation amended on December 20, 2002, that Brown was unlawfully laid off in December, 2001, was not timely filed within the meaning of Section 10(b) because it involved an event which occurred more than six months prior to the filing of the timely filed charge in April, 2002. That allegation can survive a 10(b) challenge only if it is "closely related" to the allegation in the original, timely filed charge. *Nickles Bakery of Indiana,* 296 NLRB 927, 928 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1118(1988).

> First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise form the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to the allegations. *Nickles Bakery*, above, at 928.

The Board has generally found that there is "a sufficient relation between the charge and subsequent allegations in circumstances involving acts that are part of the same course of conduct such as a single campaign against a union." Further, the Board will find a "sufficient factual relationship whether or not the acts are of precisely the same kind and whether or not the charge specifically alleges the existence of an overall plan on the part of the employer." *Ross Stores, Inc.*, 329 NLRB 573 (1999). The same "closely related" test is applied to cases in which a prior allegation raising the same issue has been withdrawn or dismissed. *Seton Co.*, 332 NLRB 979, 983 (2000).

The charge amended on December, 2002, meets all the tests required in Redd-I. First, the amended charge which alleges Brown's unlawful layoff involves the same legal theory as the original timely filed , April, 2002 charge. The theory is that the Respondent engaged in a course of conduct in violation of Section 8(a)(3) of the Act by discriminating against its employees. The original charge alleged that the Respondent unlawfully undermined the Union by eliminating unit jobs and discouraging employees from supporting the Union. This clearly encompasses Brown's layoff in December, 2001 which was alleged in the December, 2002 amendment. Although the "elimination of unit jobs" may technically refer to Agnant's dismissal, which was not specifically alleged in the charge, the overriding thrust of the original charge is to place at issue the Respondent's actions relating to its employees following the retention of WC & F. Accordingly, the layoff of Brown, which could be considered an elimination of a job, fits well within the parameters of the original, timely filed charge. Finally, it is clear that the Respondent's defenses remain the same generally. An investigation of the elimination of jobs would logically entail an investigation of the Respondent's layoff of Brown.

I accordingly find that under the Board's "closely related" test, the allegations of the amended charge are sufficient to support the same allegation in the complaint.

(b) The Merits of the Layoff

In *Wright Line*, 251 NLRB 1083 (1980), the Board stated that the General Counsel has the initial burden of proving that a respondent was motivated in discriminating against an employee because of his union activities, or other protected, concerted activity, or that the person's union activities was a motivating factor in the employer's decision to discriminate against him. Once that is established, the burden shifts to the respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct.

First, I find that Brown should have been permitted to bump into the boiler room since he had greater seniority than boiler tender Netsel. It is true that Brown had been asked to work in the boiler room only two months before, and refused. However, upon being informed of his layoff he requested, pursuant to the contract, that he bump into that position. I need not resolve the controversy over whether Brown was present at the boiler room conversation or whether he said that he was unqualified to work there. A letter was sent claiming that Brown made that claim, and the letter was not challenged. Although he had earlier refused to work in the boiler room, he now requested such an assignment as an alternative to layoff. Brown had worked as a boiler tender for a number of years, and left that position voluntarily. He did not leave because he was unqualified. The Respondent was undoubtedly aware of this. Upon asking to bump into the boiler room it was incumbent upon the Respondent to inquire as to whether Brown believed that he was unqualified to assume that position, or to demonstrate his skills. The Respondent did neither. I do not believe that it was entitled to dismiss Brown's request for contractual bumping rights without further inquiry.

Brown was the Union's shop chair at the time of his layoff. The Respondent, through its board members, expressed a significant amount of animus toward Brown because of his union position or activities in behalf of the Union. Thus, as set forth above, board member Tortorello advised that the Respondent should ignore the contractual provision that employees, specifically Brown, could attend union meetings on company time. Marcinczyk wanted to get rid of Brown because of he was the shop chair, and both board members complained often about Brown's grievance activities. In addition, Callahan or board members "had it in for Brown" because of his union activities. I accordingly find that Brown's union activities were a motivating factor in his layoff in December, 2001.

Callahan testified that Brown was laid off because the Respondent did not need him or Roscrans, basically because although the work load was consistent and remained the same, the employees were working in such an inefficient manner that the Respondent could perform the same work with fewer employees. This reason stands in stark contrast to the reason asserted by the Respondent's counsel—lack of work—in a position statement submitted to the Regional Office during the investigation of the charge. According to Callahan, the amount of

work remained the same, but more work could and should be produced by the remaining workers.

Neither defense was proven. Brown was qualified to perform plumbing work. Callahan conceded that Brown did such work for the Respondent, and further admitted that there is a slight increase in such work during the winter, when Brown was laid off. There was also credited testimony that in the past, more inside work was done in the winter. Although Callahan disputed that assertion, he conceded that work done in the winter was "discretionary." Whether the work was discretionary or the subject of pre-scheduled work orders, it was work nevertheless which Brown could have performed during the period of his layoff. In addition, subcontracted plumbing work on January 11, 12 and April 10 could have been done by Brown during his period of layoff.

I accordingly find and conclude that the Respondent has not met its Wright Line defense, and that the layoff of Brown on December 7, 2001 violated Section 8(a)(3) of the Act.

b. Imposition of More Onerous Working Conditions

The complaint alleges that since May 1, 2002, the Respondent has imposed more onerous working conditions on Brown.

Brown testified that upon his return to work on May 1, 2002, his title was carpenter and he was the Union's shop chair. That summer, his main assignment was the renovation of the in-walks, and to a much lesser extent—cutting grass and helping out on the garbage truck.

In May, 2002, Brown and one other employee were assigned to work on the in-walks as a two-man crew. In-walks are the 20-foot long, 3-foot wide concrete entrance to the buildings in the complex. Over the years, these walkways have become deteriorated, and it was the Respondent's practice to gradually replace them in the spring and summer months using employees in various job titles, including the boiler tenders, whose responsibilities in the boiler room were reduced during the non-heating season.

Brown was assigned by Heil to work with DeSousa, then Netsel, then Teja, and finally, Jones. The others worked from two to three days, to two to three weeks, depending on whether they could be excused from their other assignments, but Brown worked on the in-walks continuously.

Brown conceded that he had done this work before, as a carpenter and a boiler tender. However, when he did such work prior to May, 2002, he worked in a group of four. Langston also testified that during his tenure, such work was done with an eight-man crew, never with only two people.

Brown's work consisted of breaking up the concrete with the jackhammer, removing the debris with a shovel, putting the rubble in a wheelbarrow and moving it about 50 yards where it was dumped, digging up roots with an axe and pick, widening the area and placing gravel in it, framing the walk with wooden forms, and finally, with the help of a bigger crew, pouring and leveling concrete for the new walk.

During the summer of 2002, Brown did such work on about 15 in-walks. Brown, who is 59 years old, described this work as physically hard due to the effort of using the jackhammer, and lifting blocks of concrete and digging. He stated that jack hammering an in-walk consumed about three hours. He and his partner alternated the use of the jackhammer.

Brown first stated that he never had to work on in-walks in the rain. Then he testified that Heil asked him to break up the in-walks when it was raining. Brown complained, and Heil told him that he had a raincoat. Brown refused, saying that it was unsafe to use an electric jackhammer in the rain, and he was given another assignment. Brown asked whose idea it was to give him this assignment, and Heil motioned upward, which Brown interpreted to refer to Callahan.

Otocka, a leadman for five years, testified that in the summer, the boiler men helped with in-walk renovations, and indeed all workers who could be spared from other assignments are utilized for such work. He stated that three employees are used to demolish the concrete; three to remove the debris with wheelbarrows; two to prepare the forms; seven or eight workers to pour the cement; and two to finish the cement. He stated that he never saw only two employees perform the in-walk construction work since it is a tough, physical job. If only two workers did such work it would take "forever." Otocka conceded that the Respondent has the ultimate right to determine how many employees would work on a particular job. DeSousa testified that prior to 2001, when he worked on in-walks, such work was done with a crew of four employees.

Callahan testified that inasmuch as the Respondent owns only one jackhammer, the job of breaking up the concrete is a two-person, and not a four-person job since only one person could use the jackhammer at one time.[14] When the jackhammer is in use, the other employee picks up the debris and takes it away. Similarly, the placement of the wooden forms is a two-person job, and then the concrete is poured by a four to five person crew. He further noted that the four new employees hired in October to do the in-walks worked in two-man teams. When Brown complained to him that he did not like the "situation", Callahan replied that that was the only work available. Indeed, he further testified that "Dennis Brown was coming back [from layoff] to do in-walks." Callahan did not recall telling Heil to require Brown to use the jackhammer in the rain. He stated that in a hard downpour the only work done was garbage removal. In a light rain, the workers have rain gear and are expected to work.

Heil testified that Callahan told him to assign Brown to in-walks and other work orders as needed, including carpentry work. Brown told Heil that he had a master plumbers license. He stated that Heil did not assign him to much plumbing work because Tapanes was doing the plumbing jobs following plumber Giannattassio's departure. However, according to Langston, Tapanes was a plumber but transferred from that position to a job on the garbage truck, and Reid is a carpenter having no plumbing experience.

Heil stated that although he was aware that Brown knew carpentry and sheetrock work, he worked mostly at doing in-walks, until he hurt his back and was out of work for several

[14] The Respondent's brief, p. 89, concedes that Callahan made this change: "Callahan determined that the first phase of demolishing the in-walks could be performed with a two-man crew, and not with a larger crew that had been used in prior years."

weeks. Heil stated that he and Callahan were concerned that by continuing to demolish the in-walks he would injure himself further, so they reassigned him to other work.

Invoices from Mr. Rooter Plumbing were received in evidence to demonstrate that Brown could have been assigned to less arduous tasks than the in-walks. Brown testified that he could perform such work and has done such work in the past. Thus, on May 24, 2002, a bathtub drain line was snaked.[15] Callahan testified that the Respondent contracted work to Mr. Rooter when unit employees said they could not do the work. He added that he would never prefer to give work to Mr. Rooter as that company was expensive, but nevertheless, since he could not assign employees to work in the crawl spaces he had no choice but to have Mr. Rooter do such work.

i. Analysis

It is true that, prior to his layoff, Brown had broken up in-walks as part of his duties, and had other assignments in addition to such work. The Respondent has the right to assign work to Brown. The question is whether the work that it assigned to him was in retaliation for his Union activities.

The work assigned Brown was clearly harder and more onerous than the work he had done prior to his layoff. Whereas, before his layoff he had broken up in-walks, he was part of a four-man crew which did such work. Following his return, he was assigned to such work continuously, but with only one partner. Callahan had determined that Brown's job on his return would be in-walks.

The Respondent admits that it changed the method of breaking up in-walks so that only two men were assigned to that task, that he was "coming back to do in-walks", and that this task constituted the majority of his work. There is no question that the work of breaking up in-walks, involving jack hammering and removing concrete is physically demanding work—more so than other jobs assigned to other unit employees.

Callahan conceded that prior to his layoff Brown performed various tasks, including carpentry, plumbing and landscaping, but that nevertheless, upon his return from layoff he was primarily assigned to breaking up the in-walks, a physically demanding task.

The General Counsel has met his burden under *Wright Line*. As set forth above, Brown was the shop chair, and the Respondent, especially Callahan, who directed the assignments to Brown, bore animus against him, according to Heil. I cannot find that the Respondent has shown that it would have assigned the same work to Brown in the same manner in the absence of his union activities. The work of jack hammering and removing debris was clearly arduous and onerous, and in the past it had been performed by a crew of four. No credible reason was advanced as to why additional employees could not have been assigned, as they had in the past, to such work. I believe that the only answer lies in the Respondent's desire to harass Brown because of his Union activities.

[15] See footnote 12, above, regarding those invoices which were not considered herein because Brown was not permitted at that time to work in crawl spaces or basements which contained asbestos.

I accordingly find that, since May 1, 2002, the Respondent has imposed more onerous working conditions on Brown inv violation of Section 8(a)(3) of the Act.

c. The Reduction of Brown's Sick Leave Accrual

Pursuant to the expired contract, employees receive seven paid sick days (56 hours) per year. A new accrual of seven days is added to the employee's account on June 1 of each year. If sick leave is not taken during the year, the employee is paid for the unused amount.

Brown was laid off from December 7, 2001 to May 1, 2002, and was then recalled to work. On August 30, 2002, the Respondent informed Brown that because he worked only a part of the past year, his sick days were being adjusted accordingly. Thus, since he did not work 37% of the year, his sick time was reduced by 37% of the 56 hours sick time allotted, or a total of 35 hours.

Langston testified that the Union was given no notice of the Respondent's plan to reduce Brown's sick leave accrual prior to it being done. He further stated that the expired contract contains no language permitting pro-rating of sick time accrual, and that in his 20 years as an employee of the Respondent he did not become aware that the Respondent had reduced the sick time of any employee. Langston conceded, however, that prior to Brown's layoff, no other employee had been laid off for six months, or for any period of time, and then recalled to work.

The complaint alleges that since August 30, 2002, the Respondent reduced Brown's sick leave accrual in violation of Section 8(a)(1)(3) and (5) of the Act. [16]

The pro-rating of vacation pay is permitted by the parties' contract which provides that vacation pay is not accrued during a layoff. However, the contract is silent regarding the pro-rating of sick leave for employees on layoff.

A change in matters relating to sick leave is a mandatory subject of bargaining, as to which the Respondent was obligated to bargain with the Union. *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001).

I accordingly find and conclude that the Respondent was obligated to bargain with the Union concerning this change. Its failure to do so violated Section 8(a)(5) of the Act. In addition, I find that inasmuch as Brown was unlawfully laid off on December 7, 2001, had he remained employed, his sick leave would have continued to accrue. I therefore find that the reduction of his sick leave accrual also violated Section 8(a)(3) of the Act.

d. Issuance of Written Discipline

The complaint alleges that on various dates in the summer of 2002, the Respondent issued written discipline to Brown, DeSousa and Teja.

[16] This allegation was included as a Section 8(a)(3) violation, but not as an 8(a)(5) violation in the master complaint which was issued on September 24, 2003. However, in his opening statement and in his oral amendment to the complaint, the General Counsel made reference to this allegation as being a violation of Section 8(a)(5) of the Act.

i. The July 3 Discipline of Brown

On July 3, 2002, the Respondent issued a disciplinary warning notice to Brown for spending five and one-half hours on June 17 writing four grievances, two of which alleged the same violation of the contract—that water was shut off in the crawl spaces by non-unit employees, and the other grievances alleging that certain work was performed by subcontractors. The warning also noted that previously, Brown took about two hours to fill out four grievances with very similar allegations. The letter further stated that "while management recognizes your right to process grievances, your status as the Shop Chairperson does not give you the right to be a malingerer. Your malingering is also demonstrated by you taking extended breaks, and taking longer to perform work tasks than other employees, such as mowing the lawn. You require constant supervision or else you perform little or no work. If you [sic] work productivity does not increase, then further disciplinary action will be taken."

Each of the four grievances comprises one paragraph from eight to ten lines. They contain a simple statement of the grievance—that on a specific date, work was done by non-unit personnel in violation of the contract, and a demand for relief. Brown conceded that he had filed a grievance a few weeks earlier concerning the same subject as one of them at issue here—a non-unit person doing work in the crawl space.

Brown testified that he may have spent three and one-half to four hours writing the four grievances. The time was consumed speaking to employees and "seeking out and investigating" what occurred. He further noted that he is a "very poor writer," it took him time to write the grievances, and that he occasionally writes three rough drafts of the grievance before filling out the grievance form. Brown further stated that he had written grievances prior to this incident which may have taken the same amount of time, but he had not been disciplined in those instances. In addition, he had never before been warned about "malingering."

The expired contract provides that the Respondent "shall pay the shop chairperson and steward for all time spent during working hours on Union business including the handling and investigation of grievances, as set out in this Agreement, for time spent on arbitration hearings and for negotiations."

Heil testified that he believed that Brown spent "way too much time" writing up the four grievances, and he also believed that Brown was malingering. Callahan testified that he observed Brown writing the grievances from about 11:00 a.m. to noon, and then from 1:00 p.m. to 4:30 p.m. on June 17. He did not see Brown interviewing any workers during the time he wrote the grievances, which were similar in content. Callahan concluded that Brown simply did not want to work that day. He added that Brown had been engaged in a "work slow down" in that general time period, in which he and at least one other worker, Teja, regularly worked at a slower than reasonable pace. Callahan also noted that four prior grievances submitted only three weeks before took two hours to complete.

In deciding to issue the July 3 discipline, Callahan concluded that taking five and one-half hours to write four simple grievances was an egregious waste of time. He stated that if Brown had taken only two to three hours, he would have overlooked it, as he had the earlier grievances, since he believed that two hours was a reasonable amount of time to spend on that task. Callahan also considered that Brown was clearly engaged in Union business while writing the grievances, and he expected a grievance to be filed over the July 3 discipline. But nevertheless, he believed that Brown's action on June 17 was a gross abuse of his obligation to work a full day. Callahan drafted the warning and had Heil sign it and give it to Brown.

As to the July 3 memo accusing Brown of "malingering", Callahan testiftied that when Brown returned to work on May 1 from his layoff, he engaged in a "slow down," doing whatever he wanted to do, taking longer to perform such work as mowing the lawn, than other employees, and he required constant supervision, or else he would do little or no work.

Brown was engaged in protected, concerted activity in writing the grievances, and was also acting pursuant to the contract which broadly provided that he would be paid for all time spent during working hours on Union business, including the handling and investigation of grievances. The contract provides no limitation on the amount of time a Union agent spends in writing grievances, but clearly a reasonable amount of time is contemplated. A factual question exists as to the amount of time that Brown took in writing the four grievances. Brown said that the least amount of time he took was three and one-half hours, and Callahan said that he would have overlooked the matter if Brown had only taken three hours. Inasmuch as I credit Brown's testimony that part of the time consisted of speaking to employees and investigating the matter, and that Callahan did not testify that he watched Brown for five and one-half hours, it is reasonable to conclude that Brown was not merely writing for the amount of time it took to prepare the grievances, but also investigating the matters involved.

For the above reasons, I find that the warning note to Brown for taking too much time to write the four grievances interfered with his right to engage in union activities, and violated Section 8(a)(1) of the Act.

ii. The July 5 Discipline of DeSousa and July 12 Discipline of Brown

On July 5, 2002, DeSousa received a written warning which stated that on July 2, he permitted two employees to stand around the shop area from 10:15 a.m. to 11:50 a.m. without assigning them work. The letter noted that as the leadman he is expected to make work assignments. DeSousa showed the letter to Brown and together they confronted Heil. Brown testified that was approached by DeSousa while he (Brown) was walking to the bathroom, and he became upset, believing that the warning was unjustified. Together, Brown and Heil went to see Heil. Brown asked Heil in a loud, yelling, very forceful manner "what the hell is this crap?" Brown testified that he was upset at the discipline to DeSousa because he knew that he and Teja had been at the dump during the time in question. Brown apologized for being loud, and then stopped yelling, but demanded the identity of the two unnamed employees. Heil told him that the two employees referred to in the letter were Brown and Teja. B

This was the first warning issued to DeSousa, who denied that he was in the shop area, as alleged, at that time. He also

denied being present with Brown or Teja at that time. However, he first testified that he was in the maintenance area, and then stated that he was not there. Brown testified that he and Teja were at the garbage dump from about 10:18 or 10:28 a.m., and he produced a receipt from the dump, which bore a stamp which indicated that at 10:48 a.m. his truck was weighed, and at 11:00 a.m. the truck left the dump. He stated that he and Teja returned to the Respondent's premises at about 11:20 a.m., and then went to lunch until 11:50 a.m.

Callahan testified that the July 5 letter should have read "11:15 a.m.", and not "10:15 a.m." as the time that DeSousa was first observed not assigning employees to work. Nevertheless, Callahan did not issue a memo correcting the time. Callahan stated that at about 11:30 a.m. he personally observed Brown and Teja not working, and DeSousa standing in the area. He asked Brown what he was doing. Brown replied that he was working on in-walks. Callahan asked why he was not doing that work now, and Brown answered that no one told them which in-walk to work on next. Callahan believed that to be true, and asked DeSousa what assignment he was giving the two men. DeSousa shrugged and did not respond. Callahan called Heil and told him to have them get to work. Heil said that Tortorella just reported that the men were idle. Accordingly, Callahan decided to issue the warning to DeSousa for not assigning the men to work. Inasmuch as Brown and Teja were not given an assignment, he did not issue a warning to them.

On July 12, Brown received a written warning, signed by Callahan, which stated that on July 5 at 3:45 p.m. he left his workstation without authorization to meet with Heil, and yelled and screamed at him in a very loud voice concerning the warning letters to DeSousa and Netsel. The letter added that Brown did not return to his work assignment for the balance of the shift to 4:30 p.m. The warning called Brown's behavior "totally unprofessional, disruptive and will not be tolerated in the future." It also asked him to make an appointment through clerical employee Johnson to meet with Callahan regarding union matters, noting that he may not leave his work assignment without authorization to discuss union business "whenever you choose." Finally, the letter noted that Brown "continued to find excuses to not work a full eight hours" and that he had been previously warned to improve his productivity. "While management recognizes your right to process grievances, your status as the Shop Chairperson does not give you the right to be a malingerer." The letter concluded that if his work productivity does not increase, further disciplinary action will be taken. Callahan stated that Brown has a habit of yelling at people, and he has yelled at him in the past.

Brown testified that he has never needed authorization to leave his workstation to use the bathroom, which he was walking to when DeSousa showed him the warning letter. He stated that between his last warning on July 3 for taking too much time to write grievances and this warning, no one had spoken to him regarding his work productivity.

DeSousa was not a union representative and did not attend any grievance meetings, arbitration hearings or contract negotiations.

Heil's pre-trial affidavit stated that board members Marcinczyk and Tortorello complained often about Brown's grievance activities. Heil's affidavit also stated that he believed that Callahan or some of the other board members "had it in for Brown" because he filed many grievances and utilized "Union time" doing so on the Respondent's time.

The General Counsel does not argue that the warning to DeSousa was issued because of his union activities. Rather, he asserts that the warning was given in order to punish unit employees in an effort to discourage their support for the Union since Brown and Teja were active Union officials and also in retaliation for Brown's July 3 warning.

The basis of the warning to DeSousa was that he failed to assign work to Brown and Teja for more than 1½ hours, from 10:15 a.m. to 11:50 a.m. As proven by the General Counsel, documentary evidence supports a finding that at 10:48 a.m. a truck occupied by Brown and Teja was weighed at the dump, and at 11:00 a.m. the truck left the dump. Brown credibly testified that he and Teja were at the garbage dump at about 10:18 or 10:28 a.m., and returned to the Respondent's premises at about 11:20 a.m. when they then went to lunch. Accordingly, at most, DeSousa failed to assign the two men to work for fifteen minutes, from 11:15 a.m. to 11:30 a.m. when Callahan claimed he saw the men being idle. I recognize that Callahan claimed that a typographical error had been made in the letter which claimed that the men were idle from 10:15 a.m., but nevertheless the letter was not corrected until he testified in contradiction to it at hearing.

Although no discipline was issued to Brown and Teja because they were idle, a reasonable inference could be drawn that the Union activities of the two men was a motivating factor in the issuance of DeSousa's warning letter. *Wright Line,* above. Brown and Teja were the two Union officials in the facility, and the Respondent's animus toward the Union and Brown have been amply set forth above. The reason given in the warning, that DeSousa failed to assign the men to work during the specific time that they were off the premises, was false. The men were actually working during part of that time. Under these circumstances, I find that the Respondent has not established that it would have issued that letter in the absence of the Union activities of Brown and Teja.

Brown was understandably upset at receiving the warning for his conduct in confronting Heil with respect to DeSousa's grievance. Brown's offense at the warning was reasonable particularly since he had evidence that he had been at the dump during the time specified in the letter when, as it turned out, he and Teja were accused of not working. In speaking with Heil, Brown was presenting a grievance concerning the warning given to DeSousa. "It is well settled that an 'empoyee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect.'" *Mast Advertising & Publishing,* 304 NLRB 819 (1991). The warning primarily objected to Brown's confrontational approach to Heil. Brown admitted yelling and speaking forcefully to Heil, but then stopped that behavior and apologized. Brown did not curse or engage in violent conduct, and his conduct posed no threat to the Respondent's maintenance of order, respect, or discipline. *Mast,* above, at 820.

I accordingly find that the warning letters to Brown and DeSousa violated Section 8(a)(3) of the Act.

iii. The August 5 Discipline of Brown and Teja

By letter of August 5, 2002, Brown received a disciplinary warning which stated that on July 3, he was seen sitting on the steps of building 58 "smoking and not performing your assigned work." The letter further stated that on July 5, "you were talking to a resident in a loud voice for approximately twenty minutes instead of performing your assigned tasks." The letter warned that "this behavior is totally unacceptable. You continue to work less than the required eight hours per day. You have been verbally warned and received other non-performance letters." The letter concluded that if Brown's work productivity does not increase immediately, his "suitability for employment at Success Village Apts, Inc. will be reviewed."

Brown stated that he is a smoker, and occasionally takes a break to smoke, and at times smokes while working. He had never been disciplined prior to that time for smoking. Brown denied smoking while sitting on the steps of building 58. He stated that he was on garbage duty that day. He further recalls speaking to resident Sonja on July 5, perhaps for 20 minutes, although he later denied speaking to her for 20 minutes, adding that he was working during their conversation. He denied that he spoke to her in a loud voice. Their conversation concerned a letter she received from the board of directors. He conceded that when he works he exchanges pleasantries with residents. He had never been disciplined prior to that time for speaking to residents. Brown receives two 10-minute breaks per day, at 10:00 a.m., and at 2:00 p.m., and a 30-minute lunch break at noon. He stated that he does not abuse his break times, but also takes smoking breaks of a couple of minutes, not exceeding five minutes, in addition to the regularly scheduled breaks. Also, if he is tired, he will sit down during the workday.

Callahan testified that a board member observed Brown's conduct set forth in the letter of August 5, and requested that Callahan discipline him.

On August 5, Teja was issued a disciplinary warning which stated that he was observed on July 3 sitting on the steps of a building and "not performing your assigned tasks." The letter also stated that on July 5 he was seen talking to a resident for about ten minutes and not working. The letter concluded that he had been "previously verbally warned about [not] working a full eight hour day." Teja did not testify.

Langston testified that during his employment with the Respondent he has spoken to residents while working, whether or not he was working for that resident at the time. No discipline has resulted from any ten-minute conversations with a resident.

I cannot find that a violation of the Act has been committed in the issuance of the warnings to Brown and Teja for speaking to residents for extended periods of time. Brown admitted speaking to the resident for about 20 minutes, but explained that he was working while speaking to her. Since he was on garbage detail at the time, I find that it would be very difficult for him to perform such work while engaging in an extended conversation. Inasmuch as Teja did not testify I credit Callahan's recital of what he was told by the resident concerning Teja's not working.

I accordingly find that the issuance of the August 5 warnings to Brown and Teja did not violate the Act.

e. The Refusal to Provide Asbestos Awareness Training to Brown and Teja

The complaint alleges that since about July 26, 2002, the Respondent refused to provide asbestos awareness training to Brown and Teja. On that date, the Union received an asbestos report from the Respondent, and learned that Brown and Teja had not received asbestos training that had been provided for other employees. Langston had not been told, prior to receiving the report, that Brown and Teja would not receive asbestos awareness training.

The Respondent was aware of the presence of asbestos in the crawl spaces and the basements of the buildings as early as March, 2001, when it told the employees that if they see friable asbestos in those areas they should leave immediately. In July, 2001, they were prohibited from entering those areas.

A report of an asbestos investigation was issued on July 24, 2001. Callahan received it shortly after he began work with the Respondent in August. The first report recommended the removal of asbestos. Callahan looked into alternatives to removing the asbestos. Dr. Forrest wrote a report dated October 14. A follow-up report was written on October 30 which recommended the implementation of a program including asbestos awareness training and the use of respirators while working in asbestos contaminated areas. In about October, 2001, Callahan received asbestos reports from various experts. Respondent's attorney, Zaken, wrote a letter to Union president See on November 1, 2001, transmitting the reports to the Union at its request. A Connecticut Department of Labor agent visited in February, 2002, and thereafter determined that maintenance employees should not enter the crawl spaces, and directed that an asbestos awareness training program be conducted. Callahan retained a firm to conduct the training, which consisted of three phases: asbestos awareness training and the showing of a film on April 23; a medical evaluation, completion of a questionnaire, and a fit test with an explanation of the use of the respirator in June or July; and, thereafter, a fit test with the respirator. The employee must complete each step of the training program before proceeding to the next session.

On April 19, 2002, Callahan posted a notice in the boiler room requesting that six employees, DeSousa, Giannattassio, Netsel, Reid, Tapanes, and Teja, attend a mandatory asbestos awareness training program on April 23. Callahan testified that all the employees listed were actively working at the Respondent's premises. He noted, however, that plumber Giannattassio was on workers compensation and had not actually been at work since October, 2001, and "if" he returned to work he should be trained. In fact, he never returned to work. He and Teja did not attend the training session. Callahan gave uncontradicted testimony that Teja told him that he would be at home sleeping after his evening shift in the boiler room. Callahan did not insist that he be present, and Teja received no discipline for refusing to attend. Callahan believed that the six employees mentioned in the notice constituted an "adequate" number of workers to be trained. He knew that Brown had done some plumbing work, but also knew that Brown would be returning

to work from layoff to perform work on the in-walks. He conceded that none of the OSHA reports limited the types of workers to be trained. In fact, the Connecticut report broadly stated that training should be given to workers who perform work in areas containing asbestos.

On April 23, the date of the asbestos training, Brown was on layoff status. He testified that on April 23, he was in the basement when he saw Heil ask three workers to report to see a film regarding asbestos. Heil specifically told Brown and Teja that they would not go to the training session. Brown asked why he was excluded and Heil did not reply. Maintenance employees DeSousa, Netsel, Reid, and Tapanes attended a two-hour asbestos awareness training session that day. Managers Callahan and Heil, and also board members Olbrys and Skonieczny attended the training that day.

On April 23, Brown was on layoff status, and according to Langston could not have attended the asbestos awareness training session. He returned to work on May 1. Langston stated that both a carpenter and plumber must be trained in asbestos awareness because they are exposed to asbestos during their work.

Brown was not invited to the final two phases of asbestos training because he had not attended the April session. Beginning on August 1, 2002, all employees except Brown had completed the asbestos training and were certified to work in areas containing asbestos. Brown was given asbestos training in 2003 and completed such training.

I cannot find that Teja was unlawfully refused asbestos training on April 23. His name was on the list of employees invited to attend the training.[17] Callahan gave uncontradicted testimony that Teja refused to attend the training and did not appear. I accordingly will dismiss this allegation.

However, it is clear, and I find that Brown, the Union shop chair, was deliberately excluded from training. His Union activities and position as shop chair, I believe, contributed to the decision, and the animus of the board and of Callahan toward the Union and Brown motivated its decision to exclude him. *Wright Line*; *Scott-New Madrid-Mississippi Electric Cooperative*, 323 NLRB 421, 423 (1997). By excluding Brown from an opportunity to receive asbestos training in April, his ability to perform work in asbestos contaminated areas was delayed. Such delay caused him to be excluded from work opportunities which might arise in such areas, and lessened the amount of work available to him. *Einhorn Enterprises*, 279 NLRB 576, 591 (1986). The fact that thereafter, Brown refused to shave and therefore become able to wear a respirator, or later refused certain "volunteer" work in the basements is irrelevant since we are concerned here with the initial decision as to who should receive asbestos training.

The various reasons given by the Respondent for its failure to include Brown in the asbestos training do not ring true. Callahan asserted that Brown was on layoff and thus could not attend the training. The training was conducted on April 23, and Brown was scheduled to return from layoff one week later, on May 1. He could have been asked to return to the facility to attend the training. Indeed, Brown gave uncontradicted testimony that he was at the facility on April 23. He could have been included at the last moment, as apparently the two board members were. Callahan stated that they were at the facility that day and wanted to be trained. Significantly, Giannattassio was invited to have such training although he was absent from work on workers compensation and had not actually been at work since October, 2001. Callahan said that "if" he returned to work he should be trained. In fact, he never returned to work, whereas Brown was scheduled to return to work only seven days after the training and was not invited to be trained. Although Callahan believed that Brown would perform work on the in-walks when he returned, there still existed a possibility that he would work in areas contaminated with asbestos. Clearly, it would be more likely that Brown would work in such areas than the two board members who were trained that day. In addition, the OSHA agencies did not limit the types of workers to be trained, but indeed stated that such training should be given to workers who perform work in areas containing asbestos. Brown was one of those workers.

I accordingly find and conclude that the failure to provide asbestos awareness training to Brown on April 23, 2002 violated Section 8(a)(1) and (3) of the Act.

f. The Layoff of Brown on October 18, 2002

On October 12, the Respondent notified Brown that he would be laid off, effective October 18, for lack of work. Brown testified that when he was given the notice, he was working with DeSousa in installing sheetrock and painting a couple of ceilings and a bathroom. That work was not finished when he was laid off. Brown also stated that during the winter, the employees were kept busy with inside work as well as snow removal. Reid testified that at the time that Brown was laid off, there was no decrease in the level of work, but conceded that although there was plumbing and maintenance work, there was not too much carpentry work.

Also on October 18, four new employees who worked for the Respondent for only one month, were also laid off. Brown stated that he told Heil that he wanted to exercise his bumping rights, and asked whether Netsel would also be laid off. Heil said that he did not know anything about that.

Callahan testified that in the fall of 2002, 160 fireproof apartment doors had to be installed, and he asked DeSousa whether he and Reid could do the work.. DeSousa replied that they could not do that work. A subcontractor was hired to do that work. DeSousa testified that Callahan asked him if he could install the doors. He replied that he could not do so alone since he was the only carpenter, inasmuch as Brown was laid off and Reid worked at plumbing.

A charge alleging the unlawful subcontracting of those doors was either withdrawn or dismissed. Regardless of whether the charge was not pursued, the replacement of the fireproof doors was offered to the unit employees and declined since not enough workers were available to perform such a large job. Brown performed carpentry work. DeSousa's response to Callahan demonstrated that if workers were available, the unit employees could have done the job. Clearly, this establishes

[17] The General Counsel asserts that Teja's name was added after the list was issued. This should have been raised at trial as there is no evidence to support this claim.

that there was work for Brown to have performed at about the time he was laid off.

I accordingly find and conclude that the General Counsel has proven that, based on the considerations set forth above, that the Respondent's ongoing discrimination against Brown, including the October, 2002 layoff, was motivated by his Union activities. I further find that the Respondent has failed to prove that it would have laid Brown off even in the absence of those activities as it had available work for him to perform, including the ceiling and carpentry work he was doing at the time of his layoff and the installation of the fireproof doors. I therefore find that Brown's layoff on October 18, 2002 violated Section 8(a)(3) of the Act.

3. The Alleged Harassment of Brown and Reid

The complaint alleges that since about June 5, 2003, the Respondent harassed Brown and Lloyd Reid by assigning them work (a) that they do not normally perform (b) without the use of customary or adequate equipment (c) without customary or adequate assistance (d) which was more physically demanding, and on June 5, watched them more closely and frequently while they were working. In the summer of 2003, Brown was the shop chair and Reid was the shop steward.

a. Dennis Brown

Brown was laid off in October, 2002, and returned to work on May 5, 2003, resuming his position as shop chair. His notice of recall stated that he was being recalled "in order to do in-walks and other miscellaneous tasks."

Upon his return to work, Brown was assigned to grass cutting, changing door locks, moving tile and sheet rocking ceilings with DeSousa. One month after his recall in May, 2003, he was told by Callahan that two new employees would be starting work doing the in-walks, and that Brown would train them, and he should let them do the bulk of the heavy work since he (Callahan) did not want Brown to injure his back. Callahan said that he would probably continue to cut grass and do other work. The new employees were Luis Andrade and Greg Pavliscsak.

Heil testified that Andrade and Pavliscsak were hired because the Respondent needed additional help in the renovation of the in-walks. They began work on the in-walks, but then were reassigned to lawn cutting and garbage pick up. Brown, who was doing the in-walks when the two men were hired, continued in that assignment. In Heil's opinion, the work that Brown did was harder than the jobs the two new men were assigned. He observed Brown and Teja breaking up the concrete with a jackhammer, alternating such work, and also noted that in the May and June, 2003 period, Brown and Teja did most of the in-walk work, with Brown doing the bulk of the work.

Manager Segneri testified that Andrade and Pavliscsak were already working on in-walks when he was hired, and the following week he assigned them to work on more in-walks, where they worked for about three to four weeks thereafter. He noted that they worked exclusively on in-walks during that time, doing only the hardest work—using the jackhammer and clearing rubble. Segneri claimed that during his first week of work, Brown was cutting grass, which had been assigned by Heil.

Brown stated that he did not work on any in-walks from the time of his recall until the new men were hired. Thereafter, he worked with them and trained them in the removal of the old concrete and framing. Shortly after Segneri became employed with the Respondent, he assigned Brown alone to fill the in-walk with process, which is pulverized dirt and rock. Brown testified that he told Segneri that ordinarily two to three workers do that job, and that they use a New Holland mini-bucket loader machine to assist them. According to Brown, the New Holland lifts the process and loads it into the wheelbarrow, making the job more efficient and speedily done. Brown stated that he asked Segneri if the men could use that machine and Segneri replied that he would let them know when they could use it.

Brown stated that Andrade and Pavliscsak worked on in-walks for about three weeks only. He added, however, that he did all the "labor-intensive" work, and that he worked on in-walks for most of the summer. Teja, too, also did in-walks in the summer. They both chopped out the concrete, Brown dug and framed, and filled in the cleared area with dirt and process. Brown noted that Teja occasionally chopped the in-walks alone, and carried the process in wheelbarrows as Brown did. Brown also conceded that Reid used the plastic forms to frame the in-walks by himself.

Brown stated that his primary job all summer was to move broken concrete with the wheelbarrow. Segneri asked him to move stone process from one side of a field to the jobsite to be filled into the in-walks. Brown did not ask to use the New Holland because he knew that he was being "railroaded." He did such work from 8:00 a.m. to 3:30 p.m. when he was helped by another worker. Brown testified that while he was doing such work, board member Skonieczny asked why he was not using the New Holland. Brown said that he was not permitted to use it unless he was told to do so. Skonieczny said that that was ridiculous, and that he would speak to Segneri. Skonieczny told Brown later that Segneri said he could use the New Holland. Brown replied that if he had been given such permission he would have used it, and not worked so hard with the wheelbarrow. Skonieczny said that "that's because they're trying to get rid of you and they're making it hard on you."[18] Later, Skonieczny told Brown that Segneri said that he had permission to use the New Holland. Brown estimated that he walked about 17.5 miles that day. He stated that he never had to walk that far in order to move process from one place to another.

Segneri asked DeSousa to frame a sidewalk and DeSousa protested that such work required two workers, one to hold the boards, another to assemble them. When Segneri asked him to try to do it himself, DeSousa refused. DeSousa began to help Brown put the process in the in-walk. Segneri approached and assigned Reid to help DeSousa frame the in-walk, saying that installing the process was Brown's job, which Brown would do alone. At that time, Andrade and Pavliscsak were cutting grass.

[18] Brown's notebook notation of this conversation omitted any reference to Skonieczny's comment that they were trying to get rid of Brown. I place no great emphasis on this omission inasmuch as Brown stated that he already knew that the Respondent sought to eliminate him from the work force.

Brown stated that he spread the process for about 1½ days, and was not permitted to use the New Holland machine during that time, although he was permitted to use it later that summer. On the second day that he spread process, he was assigned to chop the roots from an in-walk to prepare it for framing. Brown stated that as he was chopping the roots, Segneri stood over him with his arms folded. Brown became nervous and asked Segneri whether he would "stand there all day and watch me work?" Segneri replied that he was supervising, doing his job. Brown answered that Segneri was making him nervous, adding that he did not need to be watched. Brown stated that Segneri stood there for 30 minutes, when Brown said that he was "intimidating" him, and threatened to file charges alleging "intimidation." Segneri then left. Brown testified that Heil never watched him work for 30 minutes at a time.

In June, 2003, Hugg Construction Company, a paving contractor, was at the Respondent's premises paving a parking lot, when Brown observed its backhoe operator break up and dig out two in-walks. Brown interrupted his own work, and approached the contractor's worker, announcing that he was doing the work of the Respondent's employees. Brown asked him who authorized such work, and Segneri was identified. Brown approached Segneri and announced that the contractor was doing their work. Segneri said that Brown had no business speaking to the contractor's employee. Brown said that, as the shop chair he had a right to question someone who was doing unit work. Segneri replied that he was just doing "us" a favor, and that Brown should return to work. Brown asked to have a meeting with Segneri and Reid about the matter. Segneri refused, and assigned Brown to pick up concrete and take it to a building located about one-quarter of a mile away. Brown offered to get the New Holland, but Segneri refused the request, directing that he use the wheelbarrow, and further advising that he (Segneri) would tell him when he could use the New Holland. Brown testified that in the past he had been permitted to use the New Holland to move pieces of concrete since it was more efficient. He and Segneri had some discussion, and finally Brown said that Segneri made him "absolutely sick" to his stomach, and that he was going home. On one occasion, Segneri assigned Brown to use the electric jackhammer in the rain.

Segneri testified that the backhoe operator, on his own, and without instruction from Segneri, removed about three to four feet of rubble from one in-walk that had been broken up by unit employees but not yet cleared of debris. Segneri stated that he did not stop the operator as it did not occur to him that he was doing unit work, and in fact asked him, if he wished, to do him a favor, and clear the next in-walk. The operator agreed. Segneri stated that this was heavy work on a hot day, requiring employees to shovel the cement blocks which had been jack hammered, and take them in the wheelbarrow to the street. The operator simply used the backhoe to put the rubble in his truck. When Brown complained to Segneri that the operator was doing unit work, Segneri told the operator to stop what he was doing.

Brown stated that following this argument, Segneri assigned him, for the remainder of the summer, to pick up wet leaves. Brown described this assignment as particularly difficult because the leaves, being wet, were matted down, and it was necessary to use a shovel to pick them up, comparing the assignment to shoveling snow. He loaded the leaves onto the garbage truck and then dumped them. Brown conceded that such a task was unit work, and perhaps other unit employees have done that work. On one occasion while he was picking up the leaves, Brown took a short break and was asked by Segneri why he was not working. Brown replied that the work was hard and he needed to take a break. Segneri answered that his only breaks are at 10:00 a.m. and 2:00 p.m. Brown responded that if he needed to take a break he would, adding that he had high blood pressure, weak knees and back problems. Segneri laughed and left the area. Brown noted that during such occasions he was idle only for two minutes, and took such breaks at 10:30 a.m., and at 11:20 a.m. Segneri testified that the leaf assignment was prompted by tenant complaints and not for any discriminatory reason. He added that other unit employees have been assigned that job.

Following his assignment by Segneri to jackhammer the in-walks, Brown protested his assignment to Segneri, asking him whether he was going to be the only worker doing work on the in-walks alone. Brown asked why Andrade and Pavliscsak were hired to do such work, but were in fact cutting grass, inquiring whether the assignment was due to his being the shop chair. Segneri replied that everyone is entitled to his own opinion, but that is not the reason, adding that Andrade cut the grass better than he and he knows how to fix the machines.

In this connection, Segneri testified that he reassigned Brown from his regular job of cutting grass because he did that job very slowly and the lines he cut were not straight. He offered to teach him how to cut straight rows but Brown refused. In addition, according to Segneri, Brown replaced a mower belt improperly. Segneri assigned Pavliscsak because he had prior experience as a landscaper and was experienced in fixing machinery. Segneri reassigned Brown to the in-walk work, a job not requiring much skill, in which he worked with the jackhammer, cleared rubble, and spread process. Other employees such as Andrade, Pavliscsak, Teja, and perhaps Reid also jack hammered.

Brown testified that during the summer of 2003, Segneri was constantly "hawking" him, meaning that he would closely observe Brown at work by stopping at his work location and staring at him. Brown stated that Segneri engaged in such conduct at least an average of 4 times per day, but there have been occasions where Segneri would stand and watch him seven to eight times per day. Segneri's routine would be to stand watching Brown for about five minutes, and then leave, and then Brown saw him go around the building and peek around the corner. Brown stated that he felt intimidated by such conduct. Brown described the close supervision given to him by Segneri, who became angered on one occasion, telling Brown that he was told to pick up stone in one location and not another, and that he had to finish another assignment first.

Heil testified that he checked on the employees about twice during the day, for about 30 minutes—during the morning and afternoon, and there were days that he did not check on the workers, depending on what jobs they were doing, and how much work he had in the office. He did not show the workers

how to perform their work because they knew their jobs, although occasionally he perhaps instructed a worker on how to complete a task. He said that occasionally, Callahan encouraged him to be outside more, supervising the workers.

In this connection, Segneri testified that when he was hired, Callahan told him that Heil stayed in his office and "let the men do as they wished" which Callahan believed was not correct. Callahan wanted Segneri to "go out into the field" and make sure that the work was done in a proper and timely manner. Segneri had worked for the Respondent years earlier, and Callahan advised him that the Union "is still there." He denied being aware of the Board case when he was hired, but within two to three weeks of his hire he learned about the matter.

Segneri stated that upon his hire, he observed the employees several times per day, and watched Brown more often than others because of a conversation he overheard in which Brown told his co-workers that since they did not have enough nails to complete a job they would have to take a ride for a couple of hours to obtain nails. Segneri conceded standing and watching Brown for three to four minutes or less when he worked on the in-walks. Brown accused him of harassing him, and Segneri replied that his job was supervising, and he wanted to see how Brown worked. Segneri tried to visit each employee on an hourly basis. Segneri conceded that he watched Brown at least once per hour, sometimes less often, but "as often as possible," which was consistent with his practice of visiting other employees' work places. Segneri further stated that he supervises Brown more than the other workers because he is "constantly . . . gold bricking or not doing his job… I have to be watching them (Brown and Teja) constantly. When I am not watching them, nothing or very little gets done."

Brown testified that Segneri urged him to carry more material in his wheelbarrow that he felt physically capable of carrying. For example, he told a concrete deliveryman to fill his wheelbarrow only ¾ full. Segneri chided him, saying that a five year-old boy is stronger than him, and ordered him to "work like a man." Segneri demanded that he fill the wheelbarrow, telling Brown that if he did not want to carry a full wheelbarrow he could go home.

Segneri testified that when Brown protested the amount of concrete that was placed in his wheelbarrow, he asked Brown if he had a disability or medical problem. Brown said that his knees hurt. Segneri asked for a physician's note, and demonstrated that the amount of concrete in his wheelbarrow was not heavy.

Brown related another incident in which he spent an entire hot day digging out a mass of roots from an in-walk. At 3:00 p.m. he sat on a stoop and was asked by Segneri whether he had a problem. Brown said "no", and was then asked by Segneri why he was not working. Brown explained that he was taking a break, and was reminded by Segneri that his breaks were at 10:00 a.m. and 2:00 p.m. Brown replied that he was aware of that, but the weather was hot. Segneri then made a series of suggestions: that Brown punch out, go home, see a physician, perhaps take "weight training" so he could become stronger, or get a job he was able to perform. Brown responded that he had told Segneri before, when he was shoveling the wet leaves, that he would not "kill" himself for the company. Brown continued sitting on the stoop and Segneri remained there looking at him. When Brown resumed work, Segneri left. In this connection, Brown conceded that he used a tree stump grinder on two consecutive days which had been rented by Segneri. The grinder makes the job of chopping roots easier.

Regarding Segneri's suggestion that Brown see a physician, Brown stated that he was never asked to provide a doctor's note, and he has no medical restrictions which limit his ability to perform his work.

Andrade testified that when he worked with Brown and Teja on in-walks, they told him essentially that he should not work too fast, and that he should take his time. Andrade, who is 24 years old, said that his work experience with Brown was limited to one or two times, and that during such times, Brown did not work very slowly, but Brown's rate of work was not as fast as his.

Pavliscsak described Brown as a "good worker" based on his work experience with him. Pavliscsak, at 40 years old, stated that he filled his wheelbarrow with only what he could handle. Although he saw Brown move his wheelbarrow a little slower than he, Pavliscsak attributed it to Brown's being older than him.

The General Counsel asserts that Brown should have been assigned to work other than the in-walks. Segneri stated that Brown was cutting grass in the summer so he was not assigned plumbing work until September or October. Segneri testified that Brown told him that he did not like to work under the buildings, which is sometimes required for plumbing jobs since the shut-off valves are located there. Segneri assigned Brown and Tapanes to do a plumbing job. When they finished, Segneri told Brown that the job was not done correctly. Segneri assigned them another plumbing job which took 2½ hours to complete, longer than Segneri believed it should have taken. Segneri visited the job site and saw them sitting in the truck at 3:00 p.m. At 3:30 p.m., Segneri told them that the job was not done correctly and asked them to re-do it. Brown announced that he was going home. Shortly thereafter, Segneri assigned Brown to do a plumbing job under a building. At the time, Brown was wearing a beard and Segneri refused to assign him to that work because he could not wear a respirator with the beard. Brown said that he did not need a respirator, but Segneri would not permit him to work without a respirator. Instead, he suggested that Brown shave and wear the respirator. Brown refused. Although he had volunteered to do this type of work and attended a class taught by Segneri, Brown told Segneri at this time that he "unvolunteered" for this work. Segneri stated that thereafter, he gave Brown another "simple" plumbing job to perform. Segneri said that he performed the job improperly by bending the pipe instead of installing elbow fittings. Thereafter, Segneri did not assign Brown to any plumbing jobs.

Segneri testified that upon his hire he began to observe the employees as they worked, and formed impressions concerning their work ethic and their abilities. He concluded that there were areas where he believed that he could make the employees work more efficiently. For example, where Reid claimed that certain plumbing work required two employees, discussed above, Segneri determined that only one worker was required. Similarly, the use of plastic forms for the in-walks required

only one person to put them together, and changed the installation of furring strips to a one-person job. He also obtained four sets of finishing tools for concrete installation so the men could work together to get the job done more quickly. He also ordered concrete, which could be mixed as needed, as opposed to the prior practice of mixing all the concrete at one time.

Segneri stated that in an effort to make the employees' jobs easier and efficient, he bought new equipment, such as new tools to be used when working on the in-walks.

i. Analysis

The above facts establish that, although Andrade and Pavliscsak were hired to work on the in-walks, they were nevertheless, shortly after Segneri's hire, assigned to other, less demanding tasks. That assignment caused Brown to work on in-walks for the vast majority of his time. Brown was required to perform the most arduous tasks, breaking up the concrete and removing the rubble with a wheelbarrow, while at the same time being denied the use of the New Holland machine, which would have made the removal process easier. Although the new workers may have cut the grass in a better manner than Brown, nevertheless, prior managers, including Heil apparently found no fault with Brown's grass cutting.

The Respondent's assignment of Brown to such arduous work, while at the same time refusing to permit him to use the New Holland to make such work easier, establish that it sought to harass him through such assignments. In addition, following a conversation in which Brown questioned the use of a contractor to do unit work, his assignment was changed to the arduous task of picking up wet leaves. That assignment was accompanied by Segneri's close supervision. Regarding Segneri's claims of Brown's laziness, presumably neutral employees Andrade and Pavliscsak described him as a good worker.

Although Segneri claimed that he was justified in watching Brown closely because of his perceived laziness and interest in shirking work, the manner in which Segneri watched him exceeded the bounds of what could be considered proper supervision under the circumstances and amounted to harassment. Thus, Segneri stood over Brown with his arms folded for 30 minutes, and only left after Brown claimed that such conduct was intimidating. There was no evidence that any other worker was supervised in this manner. Brown was also frequently treated in a humiliating way by Segneri, who compared him to a crying child on more than one occasion.

I find that the General Counsel has established that the Respondent was motivated in harassing Brown, as alleged in the complaint, because of his position with the Union and because of his Union activities in violation of Section 8(a)(3) of the Act. Brown was an outspoken, active and aggressive Union representative, and given the evidence of animus set forth above, the Respondent's unlawful motivation is established. *Wright Line.* As set forth above, the Respondent has not proven that it would have engaged in this course of conduct in the absence of his Union activities. *Palagonia Bakery Co.*, 339 NLRB 515 527–528 (2003); *EDP Medical Computer Systems*, 284 NLRB 1286, 1295–1296 (1987).

However, I cannot find that the Respondent was also motivated in its conduct because of Brown's testimony at the hearing. There is no evidence that the Respondent treated him as it did specifically because he exercised his right under the Act to give testimony. Accordingly, I will dismiss that part of the charge which alleges that the Respondent harassed Brown in violation of Section 8(a)(4) of the Act.

b. The Suspension of Brown on October 20 and 21, 2003

Brown stated that his official hours of work are from 8:00 a.m. to 4:30 p.m., but that he generally works until 4:15 p.m. The extra time is used as "clean-up time." He stated that in the summer of 2003, he went to the bathroom in order to clean up at about 4:10 p.m. He was met there by Segneri who told him not to return from work until 4:15 p.m. Brown accused him of "singling" him out, since other workers were permitted to stop work at 4:10 p.m.

On October 20, Brown had been doing landscaping work involving working in dirt. At 4:10 p.m. he had one more project to complete, and decided not to start it, but rather return to the shop. He sat on a stoop cleaning mud from his boots when Segneri asked him what he was doing. Brown did not answer, and Segneri said that he should not ignore him and repeated his question. Brown replied that he was cleaning the mud from his boots. Segneri said that it was 4:15 p.m., and demanded that he finish the work he was doing. Brown answered, "I don't think so." Segneri repeated his order, and Brown replied that he was "done." Segneri said "you're done all right, and said that he would be paid only until 4:15 p.m. Brown replied "I don't think so" and Segneri again told him to continue to work. Brown again refused, saying that it was time to clean up and go home. Brown entered the office at about 4:20 and saw his fellow workers there. Brown was paid until 4:15 p.m. that day.

The following day, Brown was called into Segneri's office, and was told that he was suspended for one day for insubordination because he refused a direct order. Brown replied that the order to work past quitting time was an unreasonable order. Segneri then wrote in his book that Brown left his job at 4:00 p.m. and refused to work when ordered to do so. Brown said that was a lie, since he left the job at 4:10, and not at 4:00. Segneri insisted that he left the job at 4:00. Callahan, who was present during the meeting, told Brown that employees are paid for eight hours work. Brown said that the employees generally get 15 minutes clean-up time. Callahan said that was a "gift" from the company, there being nothing in the contract providing for such time.

Segneri testified that he told the workers that he would allow them 10 minutes to return from their work site to the office, return their tools and punch out. He said that prior to the day of Brown's suspension he saw Brown returning to the office at about 3:50 or 3:55 p.m. It should be noted that Segneri's logbook noted that at 4:05 p.m. he checked on Brown and could not find him. Segneri told him that the workday ends at 4:30, and asked what he was doing. Brown replied that unless he had a written order he would not comply with an oral directive. Segneri then told him that he could leave his work site only at 4:20.

Segneri stated that on about October 20, he could not find Brown at about 3:50 p.m., but then saw him cleaning dirt from

his shoes on the steps near the office. At 3:55, Segneri told him that he was supposed to be working. Brown replied that he was "through for today." Segneri demanded that he return to work until 4:20. Brown refused. Segneri punched his card at 4:10, and wrote in a 4:00 punch out time. The following day, Segneri said that Brown was suspended for insubordination because he refused Segneri's order to return to work.

Heil testified that the Respondent gives employees 10 minutes clean-up time before the end of the workday. The workers are expected to return to the shop at 4:20 p.m. Employee Pavliscsak testified that he occasionally returns to the shop before 4:15 p.m., and at times when he returned before 4:20, Segneri told him not to do so. He stopped returning early, but conceded that at times he returned early because his job was done.

I cannot find that the General Counsel has established a violation of the Act. It is undisputed that the employees' workday ends at 4:30 p.m., but that they are given 10 minutes clean-up time. Brown violated that rule by ending work prior to 4:20. Pavliscsak was warned about returning early, so it appears that Brown was not the only worker subject to this rule. Although Pavliscsak was not suspended for doing so, he was not given a direct order by Segneri to return to work. In this case, Brown was told to return to work until 4:20, and he refused. Accordingly, the Respondent has satisfied its *Wright Line* burden in this respect, and I will dismiss this allegation of the complaint.

c. Lloyd Reid

Reid testified that he was classified as a carpenter, but immediately upon the hire of Segneri his job assignments changed, and he was asked to perform work he never did before, and he was asked to perform work alone that had previously been done by two employees. The work he had never done before included spraying weeds and cutting branches. Such work had previously been done by the grounds crew who work on the garbage truck. Reid had not been assigned such work by any managers prior to Segneri. Reid sprayed weeds three to four days per week, and cut branches for two to three weeks. Such work was not continuous, however. For example, he did such work only three to four days in a two-week period, then the following week he did such work only for one day, and then in the following two weeks, only two to three days. Reid conceded that one branch cutting assignment was a legitimate task requested by a tenant.

Segneri stated that he assigned Reid to spray weeds, perhaps only once the entire summer. He assigned that work to others also, including perhaps Andrade. Brown was also given that assignment but refused to perform it. Segneri also assigned Reid to cut branches with employee Pavliscsak. Such work was requested by a tenant and was assigned as "fill-in" work if no carpentry or plumbing work was available for him.

The tasks that Reid was asked to perform alone included plumbing work that had usually been done by two workers. For example, on July 15, 2003, Reid was asked to make a repair in an apartment. The job involved first shutting the water to the fixture in the basement, then making the repair in the apartment, next turning the water on in the basement and finally, returning to the apartment to test the repair. Reid testified that prior to Segneri's arrival, such a job was done with two workers, one staying in the basement to shut and then turn on the water supply, and the other making the repair in the apartment. He stated that it was easier with two employees, and told Segneri that if one worker did the job, he would track his muddy and asbestos-laden shoes into the apartment, which the tenants did not want. Segneri had suggested to Reid on another occasion that he take his boots off before entering the apartment. Reid protested that he did not have boots. Segneri obtained new boots for him about one month later. When Reid told Segneri on July 15 that he needed a helper to perform a job, Segneri wrote on the job ticket that Reid refused to do the job because he needed two employees. Segneri then asked Tapanes to do the work alone and Tapanes also asked for a helper. Then Segneri told Reid and Tapanes to do the job together.

Another job usually done by Reid with two workers was cutting wooden boards which were used as concrete forms for the in-walks. Since the boards were sometimes 25 feet long, Reid maintained that one employee was needed to hold one end against the saw to ensure that the wood would be cut straight while the other worker cut the board. Segneri told Reid that by putting the saw on the ground only one employee was needed. This was of no help to Reid since he insisted that two people were needed even if the saw was placed on the ground. It should be noted that in the summer of 2003, the Respondent purchased plastic forms, which could be assembled by one person.

During the summer of 2003, Reid and DeSousa were assigned to install an apartment ceiling. They did the preparatory work and then needed to bring three sheets of four foot by eight foot sheetrock to the apartment. Reid requested permission to use the truck to transport the sheetrock to the apartment. Reid testified that the sheetrock was located 250 to 300 yards from the apartment, contradicting his pre-trial affidavit that the distance was 260 to 300 feet. Segneri told them to carry the sheetrock to the job. They did so, which consumed 15 to 20 minutes, whereas according to Reid, they would have needed only five minutes if they transported the material by truck.

Segneri testified that neither Reid nor DeSousa asked him for permission to use the truck for this assignment, nevertheless, when Segneri asked them why they were not doing the job one hour after their assignment was given, they said that they needed a truck to move the sheetrock. He told them to move it through the back door of the building and through one apartment and out the door at the front of the building rather than walk around the building's perimeter through the back door of one building and out the front door. Reid stated that he could have used this method, but such a trek would require them to go through a kitchen.

Reid testified that during the period from late June to July, 2003, he had been refused permission to use the truck, and accordingly had to walk to get to his assignment. He conceded, however, that he has used the truck since July to transport sheetrock and tools.

Reid had been carrying a beeper for after hours and weekend emergency plumbing work since October, 2001. The employee carrying the beeper receives eight hours additional pay per week. It was Reid's practice to return the beeper to his supervi-

sor if he would be out of town for the weekend, and retrieve it upon his return to work on Monday. In June, 2003, Reid told Heil that he would not be available that weekend and would turn in the beeper the following day, Friday. Segneri, who was present, told Reid to give him the beeper. Reid obtained the beeper from his home in Success Village, and returned to the office and tendered it to Segneri, who asked him to sign a paper saying that he had voluntarily turned in the beeper. Reid refused to sign, saying he had not voluntarily returned the beeper. Reid asked Brown to become involved, and during the ensuing discussion, Reid and Segneri each accused the other of lying.

Segneri testified that one Wednesday, Heil told him that Reid would not carry the beeper thereafter. Segneri interpreted that statement to mean that he was surrendering it. He asked Reid whether it was the fact that he would not carry the beeper any more, and Reid said "yes." Segneri asked for the beeper, and Reid gave it to him. Reid asked for a note that Segneri asked him to surrender the beeper and Segneri gave him the note. Reid objected to the term in the note saying that he had voluntarily surrendered the beeper, saying that he did not voluntarily surrender it. Later, Callahan told Segneri that Reid would not carry the beeper that weekend. Segneri replied that no one told him that, and that Reid said he was not carrying the beeper. Callahan told Segneri that he resolved the misunderstanding, and that when Reid came to work he should be given the beeper, but he would not be carrying it that weekend. The following day, Segneri returned the beeper to Reid. Reid turned it in on Friday, and picked it up the following Monday, and carried it thereafter.

Reid testified that following this incident, Segneri began watching his work more closely than he was used to prior to that time. Reid noted that each time he was assigned to a job, Segneri visited his work area 15 to 20 times per day. Reid stated that occasionally, Segneri would drive up to the work site and sit in his truck for two to four minutes and then leave, followed by another visit 10 to 20 minutes later. Segneri did not explain his reason for watching him. Reid stated that this surveillance of his work continued until about September.

Segneri denied checking on Reid 15 to 20 times per day, estimating that he did so perhaps five to six times per day, which was the number of times he checked on all the other workers.

i. Analysis

I cannot find that the assignments of work to Reid or the way in which he was supervised support a violation of the Act. The landscaping work was not shown to be onerous, and although usually performed by the grounds crew, there is no showing that such work is not the type of work which could be performed by Reid. In addition, the denial by the Respondent of the use of two workers to perform the plumbing jobs which could easily be done by one is not unreasonable. This must be contrasted, of course, with the situation discussed above where Brown worked on the in-walks with only one other person, and not the usual four man crew. Such work was extremely onerous and arduous, in comparison with Reid's assistant simply being stationed in the basement, opening and closing a valve while he made the repair.

Similarly, I cannot find that the denial of a truck to move sheetrock in the various instances described above constituted harassment. The material was to be moved only short distances, and as described in the testimony would have been more easily and quickly moved by hand. The incident with the beeper appears to be a misunderstanding between Segneri, Heil and Reid which Callahan explained and resolved. Finally, I credit Segneri's testimony that he checked on Reid's work in a similar manner that he checked on other employees' work.

I will accordingly recommend dismissal of this allegation.

ii. The Suspension of Reid on July 24, 2003

On July 24, 2003, Reid was assigned to replace a ceiling in an apartment. The first step in such a task is to measure the ceiling so that furring strips could be secured to the existing ceiling. Reid told Segneri that he could not measure the ceiling without a helper since it was 25 to 30 feet long. Segneri suggested that he measure the floor, which should have the same dimensions as the ceiling. Reid said such a method of measuring would not be accurate because of a 1" or 1.5" difference between the floor and ceiling, and that the baseboard moulding and furniture would make floor measuring inaccurate.

Segneri reassigned the job to another worker, and asked Reid to replace a screen door, which he did. Reid was then assigned to break up a sidewalk and prepare it for concrete forms. Reid went to the garage for his equipment and realized that he did not have his back brace on. He reported to Segneri that he did not have a back brace or safety glasses. Segneri gave him a "worn, used" brace. Reid refused to wear it because of its poor condition. Segneri said that he had no more braces and that he should wear it or go home. At 9:00 a.m., Reid reported this incident to Brown, and then went home. He was paid until noon that day. Thereafter, Segneri gave Reid safety glasses, and a new back brace, which Reid used to perform heavy work.

According to Reid, the following day, July 25, his time card was not in the rack and he spoke to Segneri, who asked him what type of work he could do without a back brace or safety glasses. Reid told him that was a "stupid question." Segneri told him to leave his office and spray weeds. Reid protested that he did not know how to mix the weed killer. Segneri told him to read the bottle, and Reid left to prepare the mixture.

Reid testified that Segneri approached him one minute later and asked him if he found the poison yet. Reid made a remark concerning the use of the term "poison" and Segneri told him to "shut your mouth and do your job," Reid answered that he was doing just that, reading the instructions on the weed killer bottle. Segneri again told him to shut his mouth and do his job. Reid then challenged him, saying, "why don't you come and shut my mouth?" Segneri approached him, standing one foot away and shouted at him. Reid turned to walk away, and Segneri blocked his way, saying he was insubordinate because he walked away when Segneri was speaking to him.

A short time later, Reid told Brown about this confrontation, and the two sat down and prepared some notes. Segneri approached the area where the two men were speaking, and directed Reid to pick up garbage in a specific area. Some time later, Segneri gave him a different assignment—to pick up garbage in another area—before he had an opportunity to per-

form the first job. Brown asked why Reid was being assigned that type of job. Segneri replied that he did not have a back brace or safety glasses. Reid performed that assignment, and later that day was supplied with safety glasses and a new back brace.

Segneri testified that prior to his arrival at the Respondent, the employees' practice had been to measure for furring strips using two workers. Segneri said that the furring strips do not have to be measured exactly, and therefore only one worker was required for that task.

Segneri stated that when Reid refused to work without a back brace, he told Reid that it was Reid's "prerogative" to refuse to work without a brace, but that Segneri had no work for him at that time, and he could go home or work without a brace, adding that he would order a new brace immediately, and expected to receive it the following day.

Segneri testified that he then asked Reid whether there was any work he could perform without a brace and safety glasses, because "if not you might as well go home." Segneri could not recall whether Reid said that his question was stupid, but that he simply did not answer Segneri, who denied telling Reid that he was insubordinate. Segneri further denies suspending Reid, disciplining him, or docking his pay because of insubordination. Segneri stated that he offered Reid the job of spraying weed killer on weeds which did not require a brace or safety glasses. Segneri believes that Reid declined that job, and left work at 9:15 a.m.

Accordingly, the question here is whether a suspension occurred, as alleged in the complaint, and whether the course of events occurred over two days, as claimed by Reid, or one day, as alleged by Segneri. According to the General Counsel, the suspension occurred on July 24 when Segneri announced that Reid had to wear the brace he offered, or go home. Reid refused to wear a brace he believed was unsuitable, and left. According to Segneri, he offered Reid other jobs that day which Reid declined, and then left on his own.

I credit Reid's testimony, and find that on July 24, he was directed to wear the brace or leave since there was no other work for him. Segneri corroborated that testimony, but added that he asked Reid whether there were any jobs he could perform, and then offered Reid the weed-spraying job which he declined. I find that such an offer occurred the following day, July 25, after Reid returned from being sent home on July 24. It would make no sense for Segneri to first tell Reid to go home, and then offer him other work. As Segneri testified, he told Reid that he had no other work for him and that Reid should go home. The fact that Reid followed that instruction establishes that Segneri gave him that order, and I so find.

Of course the next questions are whether such conduct constitutes a suspension, and if so, whether Reid was suspended in violation of the Act. On these facts, I find that Reid was suspended on July 24. Segneri told him to wear the old back brace or go home. Segneri conceded that Reid was justified in refusing to wear the worn, used brace to perform heavy work. However, it appears that there was work to be performed that day. First, Segneri admitted that he offered Reid other jobs that day not requiring a brace, which he refused, thus proving that other jobs were available. In fact, Segneri assigned Reid to other work the following day which he performed.

I find that the General Counsel has made a showing that Reid's suspension was motivated by his position as a shop steward. This is made clear in the suspension itself, and the events which occurred just after the suspension, which demonstrate the unreasonable antagonism demonstrated by Segneri toward Reid. Thus, Segneri's action in suspending Reid although there was work for him to do that day shows that Segneri dealt with Reid in an unreasonable way which can only be explained by his animus toward him as the shop steward. In addition, the day after the suspension, Segneri engaged Reid in an unprovoked confrontation, and later gave Reid two jobs in rapid succession, asking him why he had not finished the first. It is significant to note that Reid was speaking to Brown when asked that question by Segneri.

I accordingly find and conclude that Reid's suspension violated Section 8(a)(1) and (3) of the Act.

E. The Alleged Interference with the Section 7 Rights of Employees

1. The Alleged Prohibition of Employees from Speaking with Union Agents

On September 19, 2002, the Respondent hired four employees for the purpose of renovating its in-walks. The four workers were hired through a temporary employment service, but paid by the Respondent and became employees of the Respondent. Aldrick Hamilton, one of the new workers, testified that a couple of days after his hire, Callahan told him that if a man shows up, later identified by other workers as Brown, he should "pay him no mind", just continue to work, because Hamilton did not have to "deal with" Brown since he would not be "qualified for a long period of work experience."

Hamilton stated that about three days after his hire, Brown asked him how he was hired, and whether he had a physical examination. Hamilton replied that Callahan hired him, and that he had not had a physical exam. He further testified, inconsistently, that he rebuffed Brown's attempt to talk to him, saying that he was not supposed to speak with him, whereupon Hamilton walked away.

Brown testified that in mid-September, he was not working due to an injury, but was still the Union's shop chair. He visited the Respondent's premises and asked Callahan where he obtained the new workers. Callahan replied that they were regular employees being paid by the Respondent. Brown asked if they had a physical examination and if they filled out employment papers. Callahan did not reply. Brown then introduced himself as the Union's representative to the four new men, and in response to his questions, said that they came from a temporary employment agency, did not have a physical exam and did not complete any employment papers. Brown testified, inconsistently, that the men would not talk to him and would not answer his questions. According to Brown, Callahan approached the group and told the men not to speak to Brown and not to answer his questions, adding that if Brown had any questions he could ask Callahan. Brown then asked why should he ask Callahan any questions since Callahan was a "fucking liar."

Callahan testified that upon their hire, he told the men that the Respondent was a union shop and that after 30 days they would be required to join the Union, and that the Union would be speaking with them. He stated that on their first day of work, he was told by all four men that someone was yelling and screaming at them, and harassing them, asking them how they were hired and other questions. He did not tell them not to talk to Brown. Rather, he said that he would speak to Brown and answer his questions. Shortly thereafter, Brown asked Callahan which employment agency hired the men and Callahan answered that they were hired through an agency but were on the Respondent's full time payroll. Brown called him a liar. Hamilton denied that Callahan mentioned anything about the Union when he was hired, and also denied that Brown had screamed or yelled at him, and also denied telling Callahan that Brown had done those things.

The four men were employed for only one month, and were laid off for lack of work on October 18. They did not complete their Union probationary period and did not join the Union.

The complaint alleges that on about September 19, 2002, Callahan prohibited employees from talking to Union representatives.

I cannot credit the General Counsel's witnesses with respect to this allegation. Their testimony was contradictory and inconsistent. Thus, Hamilton variously testified that he spoke to Brown, answering his questions about the nature of his hire, but also stated that he refused to speak to Brown and did not do so. Similarly, Brown testified that the men answered his questions, but also stated that they refused to speak to him and would not answer his inquiries. In addition, Hamilton's honesty is open to question inasmuch as he admitted that he accepted gasoline for his car, which was supposed to be used for the Respondent's vehicles.

The General Counsel argues that the employees at first were approached by Brown and answered his questions, and then, as testified by Brown, when Callahan saw them speaking to him told them not to speak with Brown. This could explain why the men first answered Brown's questions and then refused to do so. However, this explanation was not corroborated by any other witness, and contradicts Hamilton's testimony that Callahan first told him not to speak to Brown, but then inexplicably, he did so.

I accordingly will recommend dismissal of this allegation of the complaint.

2. The Request for Union Representation

The complaint alleges that on about July 8, 2003, Segneri denied Netsel's request to be represented by the Union during an interview, which Netsel reasonably believed would result in disciplinary action being taken against him, and that the Respondent conducted the interview anyway.

Netsel worked in the boiler room, where all the windows were kept in an open position so that the boiler would have "make-up" air needed to operate. He testified that on June 24, 2003, Segneri told him that all the windows must be closed. Netsel told him that he would close the windows, but would leave one door open to provide for make-up air. Segneri agreed. Later that day, Netsel told Segneri that he closed the windows and opened the door. Segneri said "ok." Shortly thereafter, Segneri told him that he should keep the door closed when he was not in the boiler room. Thereafter, when Netsel left the boiler room, he closed the door.

One week later, on July 8, Netsel arrived at work and found that his time card was not in its usual place. He was told that Segneri had it. He went to Segneri's office, and was asked by Segneri why the boiler room doors were not locked. Netsel replied that he was told only to close the doors when he was absent from the boiler room. Later that day, Segneri called Netsel to his office. Netsel observed that Segneri appeared "annoyed", and "agitated" from the morning meeting. Immediately upon entering, Netsel asked if this was an "official" meeting. Netsel stated that he asked that question because Segneri appeared "agitated", and he believed that he would be disciplined. Segneri replied that although the meeting was official, it was just "between" him and Netsel.

At that point, Netsel replied that if the meeting was official, he wanted union representation. At the hearing, Netsel explained that, based on Segneri's tone of voice and body language, he believed that that this conversation would be a "continuation" of the morning discussion, and that he would be disciplined or would "get in trouble" for not locking the doors. Netsel did not recall Segneri telling him that he would not be disciplined. In fact, he was not disciplined for not locking the boiler room doors.

Segneri did not grant Netsel's request for Union representation and proceeded with the interview, stating that he told Netsel to lock the doors when he was absent from the boiler room. Netsel denied being told to lock the doors, insisting that he was only told to close the doors. At Segneri's request, Netsel signed a statement, written by Segneri in his logbook, that he would lock the boiler room doors when he was absent from that room. It must be noted that the entry above that statement is Segneri's notation: "boiler room unlocked—I specifically told N [Netsel] to lock when he is not there."

Netsel stated that he did not believe that he had ever before been in Segneri's office for a personal discussion such as this one, and he had never asked Segneri for union representation prior to this time.

Segneri testified that he told Netsel to close the windows and open the doors, but that the doors should be locked when he was not present in the boiler room. Thereafter, Segneri's supervisor, Callahan, told him that the boiler room door was unlocked. Segneri stated that he called Netsel in, and told him that he wanted him to be "very clear" that the boiler room door must be locked in his absence. At hearing, while recounting his instruction, Segneri bounced his finger on the desk for emphasis, but later denied "pounding" his finger when speaking with Netsel. While giving Netsel this direction, he asked him to sign a statement that the boiler room doors must be locked, so that he understood what he just said. When Netsel asked for a union representative, Segneri told him "you do not need a Union representative. This is an instruction to you. I am going to give it to you in writing. I want to make sure that you understand clearly what I mean." Netsel signed the statement. It is significant to note that, first, Segneri testified that he told Netsel that he would not be disciplined, and then testified that he did not

use those words. Accordingly, I cannot credit Segneri that he told Netsel that no disciplinary action would result from their meeting.

Netsel has been disciplined before, for time and attendance violations, and Segneri testified that he has verbally suspended employees in the presence of their Union representative.

An employee is entitled to union representation, on request, at an interview if the employee reasonably believes that the interview will result in disciplinary action. *NLRB v J. Weingarten Inc.*, 420 U.S. 251, 257 (1975). I credit Netsel's testimony that Segneri appeared annoyed and agitated at the start of the interview, and that he believed that the interview would be a continuation of the earlier discussion, and that he would be disciplined. Inasmuch as Netsel had been previously called to Segneri's office earlier that day and questioned as to why the doors had not been locked, I find that Netsel could reasonably conclude that the interview would result in disciplinary action. This belief was reinforced when Netsel was asked to sign a document which stated that he understood that the boiler room doors must be locked. This was, in effect, a demand that Netsel formally acknowledge his responsibility to lock the doors, and implied that if Netsel refused to do so he would be disciplined.

Moreover, this was not a typical "run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work technique." *Weingarten,* above at 257–258. Segneri had allegedly given similar instructions to Netsel on the shop floor, and as recorded in Segneri's log, he had ignored them. Thus, Netsel could reasonably believe that the interview could result in discipline, particularly since it was conducted in the formality of Segneri's office and was accompanied by a demand that he acknowledge, in writing, his job responsibility. Segneri's testimony was contradictory as to whether he told Netsel that disciplinary action was not being considered. Denying union representation under these circumstances and continuing the meeting without the options provided under Weingarten violated Section 8(a)(1) of the Act. *Lennox Industries Inc.*, 244 NLRB 607, 608–609 (1979). Furthermore, Segneri was incorrect in informing Netsel that a union representative was not necessary since he did not intend to discipline him. *Weingarten* rights apply equally to "disciplinary" and "investigatory" interviews. *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979).

It is no answer to a *Weingarten* violation that Segneri had no intention of imposing discipline. Segneri was obligated to evaluate the interview from an objective standpoint - whether Netsel would reasonably believe that discipline might result from the interview. *Consolidated Edison of New York,* 323 NLRB 910 (1997). The firmness with which Segneri delivered his message—at hearing bouncing his finger on the desk for emphasis, while saying that he wanted "to make sure that you understand clearly what I mean" supports Netsel's observation that Segneri was "agitated" and "annoyed", and caused Netsel to reasonably believe that discipline would be imposed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, a labor organization within the meaning of Section 2(5) of the Act, is the exclusive representative of the employees in the following appropriate unit within the meaning of Section 9(a) of the Act:

> All production, maintenance and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by Respondent, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

3. By refusing to negotiate with the Union in face-to-face bargaining sessions concerning the terms of a renewal collective-bargaining agreement, the Respondent violated Section 8(a)(5) of the Act.

4. By insisting, as a condition of reaching any collective-bargaining agreement, that the Union agree to conduct negotiations in separate rooms through an intermediary, the Respondent violated Section 8(a)(5) of the Act.

5. By bargaining to impasse in support of the condition set forth above in paragraph 4, and implementing its contract proposals, the Respondent violated Section 8(a)(5) of the Act.

6. By unilaterally implementing a restricted phone use policy, a copier and facsimile use policy, a time card discrepancy discipline policy, a locker and lock policy, and by reducing Dennis Brown's sick leave accrual, without bargaining with the Union or obtaining the Union's consent thereto, the Respondent violated Section 8(a)(5) of the Act.

7. By unilaterally subcontracting plumbing repair work on July 5, 2002; work including starting, checking, cleaning and servicing the boilers during the period October, 2002 through November, 2002; and electrical work including changing light bulbs, without bargaining with the Union or obtaining the Union's consent thereto, the Respondent violated Section 8(a)(5) of the Act.

8. By laying off Dennis Brown on December 7, 2001; by imposing more onerous working conditions on Brown since May 1, 2002; by reducing Brown's sick leave accrual; by issuing a disciplinary warning to Brown on July 3, 2002; by issuing a writing warning to Brown on July 12, 2002; by refusing to provide asbestos awareness training to Brown on April 23, 2002; by laying off Brown on October 18, 2002; by harassing Brown by assigning him work without the use of customary or adequate equipment which was more physically demanding; by watching Brown more closely and frequently while he was working on June 5, 2002; the Respondent violated Section 8(a)(3) of the Act.

9. By issuing a written warning to Raul DeSousa on July 5, 2002, the Respondent violated Section 8(a)(3) of the Act.

10. By suspending Lloyd Reid on July 24, 2002, the Respondent violated Section 8(a)(3) of the Act.

11. By denying the request of John Netsel for union representation on July 8, 2003 at an interview when he reasonably believed that he would be subject to discipline, the Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully refused to bargain with the Union in certain respects, I shall order that it bargain with the Union in good faith by rescinding its refusal to bargain in face-to-face sessions with the Union. I shall also order that it rescind, at the request of the Union, the unilateral changes it made, including the new policies it instituted, and the proposals which it implemented following its announcement of an "impasse" in bargaining. The Respondent shall also be ordered to make whole its employees for any losses they suffered as a result of these changes. *Fresno Bee*, 339 NLRB 1214, 1216 (2003); *Dynatron/Bondo*, 333 NLRB 750, 754 (2001).

The Respondent having discriminatorily laid off Brown on December 7, 2001 and on October 18, 2002, and suspended Reid on July 24, 2002, it must make them whole for any loss of earnings and other benefits, suffered as a result of the layoffs and suspension, plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Success Village Apartments, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to negotiate with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO, in face-to-face bargaining sessions concerning the terms of a renewal collective-bargaining agreement.

(b) Insisting, as a condition of reaching any collective-bargaining agreement, that the Union agree to conduct negotiations in separate rooms through an intermediary.

(c) Bargaining to impasse in support of the condition set forth above in paragraph (b), and implementing its contract proposals as a result of the unlawful impasse.

(d) Unilaterally implementing a restricted phone use policy, a copier and facsimile use policy, a time card discrepancy discipline policy, a locker and lock policy, and reducing employees' sick leave accrual, without bargaining with the Union or obtaining the Union's consent thereto.

(e) Unilaterally subcontracting unit work without bargaining with the Union or obtaining the Union's consent thereto.

(f) Laying off, suspending, issuing warnings, harassing, or otherwise discriminating against any employee because of their Union activities.

(g) Denying the request of employees for union representation when they reasonably believed that they would be subject to discipline.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union, in face-to-face sessions, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production, maintenance and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by Respondent, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

(b) Rescind, at the request of the Union, the unilateral changes it made, including the new policies it instituted, including the restricted phone use policy, copier and facsimile use policy, time card discrepancy discipline policy, and the locker and lock policy.

(c) Rescind, at the request of the Union, the proposals which it implemented following its announcement of an "impasse" in bargaining.

(d) Make Dennis Brown and Lloyd Reid whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, suspension, and written warnings, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs, suspension, and written warnings will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Bridgeport, Connecticut, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 2001.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT refuse to negotiate with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO, in face-to-face bargaining sessions concerning the terms of a renewal collective-bargaining agreement.

WE WILL NOT insist, as a condition of reaching any collective-bargaining agreement, that the Union agree to conduct negotiations in separate rooms through an intermediary.

WE WILL NOT bargain to impasse in support of the condition set forth above, and implement our contract proposals as a result of the unlawful impasse.

WE WILL NOT unilaterally implement a restricted phone use policy, a copier and facsimile use policy, a time card discrepancy discipline policy, a locker and lock policy, or reduce employees' sick leave accrual without bargaining with the Union or obtaining the Union's consent thereto.

WE WILL NOT unilaterally subcontract unit work without bargaining with the Union or obtaining the Union's consent thereto.

WE WILL NOT lay off, suspend, issue warnings, harass, or otherwise discriminate against any employee because of their Union activities.

WE WILL NOT deny the request of employees for union representation when they reasonably believe that they would be subject to discipline.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain with the Union, in face-to-face sessions, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production, maintenance and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by Respondent, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

WE WILL rescind, at the request of the Union, the unilateral changes we made, including the new policies we instituted, including the restricted phone use policy, copier and facsimile use policy, time card discrepancy discipline policy, and the locker and lock policy.

WE WILL rescind, at the request of the Union, the proposals which we implemented following our announcement of an "impasse" in bargaining.

WE WILL make Dennis Brown and Lloyd Reid whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful layoffs, suspension, and written warnings of Dennis Brown and Lloyd Reid, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs, suspension, and written warnings will not be used against them in any way.

SUCCESS VILLAGE APARTMENTS, INC.